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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Petitioner,

v.

CHAULK SERVICES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a federal court required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), may nevertheless exercise jurisdiction if it finds that a plaintiff has made a facially conclusive claim of pre-emption, a question left open in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989).

2. Whether the National Labor Relations Act, 29 U.S.C. § 158, pre-empts state anti-discrimination laws where an employee claims an unfair labor practice and gender discrimination against an employer.

List of Parties

The parties to the proceeding below were appellee-petitioner Massachusetts Commission Against Discrimination, defendants-appellees Petrina Doulamis Sullivan and International Association of Emergency Medical Technicians (EMTs) & Paramedics, National Association of Government Employees (NAGE), American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and appellant-respondent Chaulk Services, Inc.

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v.

CHAULK SERVICES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pursuant to United States Supreme Court Rules 10 and 12, petitioner Massachusetts Commission Against Discrimination (MCAD or Commission) respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 27, 1995. Pet. App. 5A-74A. The Commission's petition for rehearing and suggestion for

rehearing *en banc* was denied on January 18, 1996. Pet. App. 75A-76A.

Opinion Below

The judgment of the United States District Court for the District of Massachusetts is not reported and is reprinted in the Appendix hereto, Pet. App. 1A-4A. The opinion of the United States Court of Appeals for the First Circuit is reported at 70 F.3d 1361 (1st Cir. 1995). It is reprinted in the Appendix hereto, Pet. App. 5A-74A.

Jurisdiction

The United States Court of Appeals for the First Circuit issued its opinion and judgment on November 27, 1995. Pet. App. 6A. The Commission's petition for rehearing and suggestion for rehearing *en banc* was denied on January 18, 1996. Pet. App. 75A-76A. The Commission invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994).

Statutes and Constitutional Provisions Involved

The National Labor Relations Act (NLRA), 29 U.S.C. § 158 (1994), is set forth in the Appendix hereto at Pet. App. 77A-97A. Massachusetts General Laws (Mass. G.L.) chapter 151B, sections 3, 4, and 5 (1994 ed.), are set forth in the Appendix hereto at Pet. App. 98A-158A. 29 C.F.R. § 1601.12 (1995) is set forth in the Appendix hereto at Pet. App. 159A-168A.

Statement of the Case

In this case, an employee claims that her employer discriminated against her based on her union activities and gender. Both claims involved the same parties and the same nucleus of facts. Petrina Doulamis (Doulamis) had filed a complaint with the Commission alleging gender discrimination by respondent Chaulk Services, Inc. (Chaulk). *See* Mass. G.L. c. 151B, § 5; Pet. App. 11A, 145A-158A. Additional labor-related charges were subsequently filed by International Association of EMTs and Paramedics, NAGE, AFL-CIO

(Union), on behalf of Doulamis, with the National Labor Relations Board (NLRB), against Chaulk. Pet. App. 8A-12A.

On December 8, 1994, Chaulk filed a complaint in the United States District Court for the District of Massachusetts seeking to enjoin the Commission from investigating Doulamis's complaint of gender discrimination. Pet. App. 11A, 12A. In its verified complaint, Chaulk claimed that the Commission's assertion of state authority over Doulamis's charge of gender discrimination directly threatens and significantly interferes with the jurisdiction of the NLRB. Pet. App. 12A. Chaulk further maintained that Massachusetts anti-discrimination laws are pre-empted by the NLRA. Pet. App. 13A.

The Commission filed a motion to dismiss arguing that the District Court should abstain under *Younger*. Pet. App. 11A. The District Court denied Chaulk's request for injunctive relief and allowed the Commission's motion to dismiss. Pet. App. 1A-4A. The District Court ruled that it would "abstain from deciding [Chaulk's] pre-emption claim (raised by way of

application for preliminary injunction) in light of the pending state agency proceedings." The District Court cited *Younger v. Harris*, 401 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); and *Brotherhood of Locomotive Eng'rs. v. Massachusetts Comm'n Against Discrimination*, 695 F. Supp. 1321 (D. Mass. 1988), in support of its decision to abstain. Pet. App. 4A.

Chaulk appealed the decision of the District Court to the United States Court of Appeals for the First Circuit. On November 27, 1995, the majority of the panel (Torrella and Casellas, JJ.[1]) of the First Circuit reversed the decision of the District Court and remanded the case "so that Chaulk may address any pleading deficiencies that currently preclude the continued prosecution of its petition for relief." Pet. App. 38A. In holding that Massachusetts anti-discrimination laws are "expressly" preempted by the NLRA, the majority of the panel noted the issue of pre-emption under the NLRA, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and

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[1] Of the District of Puerto Rico, sitting by designation.

the possibility that a "facially conclusive" claim of pre-emption might render *Younger* abstention inappropriate, a question left open in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989)(*NOPSI*). Pet. App. 23A. The majority found that since Doulamis's claims are preempted by the NLRA, the Commission does not have jurisdiction of her gender discrimination claims. Pet. App. 25A. In addition, the majority held that although the case satisfies the criteria for *Younger* abstention, abstention was nevertheless inappropriate because Chaulk's claim of pre-emption is "facially conclusive" or "readily apparent," and "no significant state interests are served when it is clear that the state tribunal is acting beyond the lawful limits of its authority." Pet. App. 33A, 36A.

The dissent (Lynch, J.) opined that the NLRA does not preempt Massachusetts anti-discrimination laws and thus, *Younger* abstention is required. Pet. App. 38A-74A. Specifically, the dissent stated that Chaulk's complaint did not present a facially conclusive claim of pre-emption "because

Congress has affirmatively stated in the language and through the structure of Title VII [the Civil Rights Act of 1964] itself that state anti-discrimination laws may provide a remedy that overlaps with the NLRA." Pet. App. 53A. In the absence of a facially conclusive claim of preemption, the dissent stated that the present case satisfies the criteria for *Younger* abstention and must be dismissed.

Reasons for Granting the Writ

The Court should grant the petition to resolve the question left open in *NOPSI*: Whether a facially conclusive claim of federal pre-emption trumps the requirement of *Younger* abstention. The Court should also grant the petition to resolve the split between the First Circuit and the Supreme Judicial Court of Massachusetts in *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. 160, 375 N.E.2d 1192 (1978), by deciding the issue whether the NLRA pre-empts state anti-discrimination laws where an employee claims an unfair labor practice and gender discrimination against an employer.

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION, LEFT OPEN IN *NOPSI*, CONCERNING WHETHER A FACIALLY CONCLUSIVE PRE-EMPTION CLAIM OVERRIDES *YOUNGER* ABSTENTION.

This case presents a question of national importance regarding whether a federal court, when required to abstain under *Younger*, may nevertheless exercise jurisdiction when it determines that a party has made a "facially conclusive" claim of pre-emption. The Court should grant the petition to answer this significant question left open in *NOPSI*.

A. *Younger* Abstention is Required Where a Party Seeks to Enjoin an Ongoing State Administrative Proceeding that is Judicial in Nature and Implicates an Important State Interest.

The Court should grant the petition to answer the question left open in *NOPSI* and enforce the principles of comity and federalism articulated in *Younger*. *Younger* held that the federal courts may not enjoin ongoing state criminal proceedings because comity requires "a proper respect for state

functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. The concept of comity represents

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to so in ways that will not unduly interfere with the legitimate activities of the States.

Id. Indeed, because of the principles of comity and federalism, "the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is *not* issue such injunctions." *Id.* at 45 (emphasis added).

After *Younger*, this Court has expressly applied its principles of comity and federalism to other pending state proceedings, including state civil and administrative proceedings. *See Middlesex Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)(Court abstained from

interfering in pending civil judicial proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. at 627-28 (*Younger* applied to state administrative proceedings concerning claims of gender discrimination). This Court rested these holdings on "the 'more vital consideration' of the proper respect for the fundamental role of States in our federal system." *Id.* at 626 (quoting *Younger*, 401 U.S. at 44).[2]

This Court has also made it clear that "[w]here a case is properly [within the *Younger*] category of cases, there is no discretion to grant injunctive relief." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 n.22 (1976); *see Sun Refining & Marketing Co. v. Brennan*, 921 F.2d 635, 639 (6th Cir. 1990)("[U]nlike other forms of

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[2] Based on *Younger* and its progeny, the First Circuit has required abstention where the civil or administrative proceedings satisfy three conditions:

> (1) the proceedings are judicial (as opposed to legislative) in nature; (2) they implicate important state interest; and (3) they provide an adequate opportunity to raise federal constitutional challenges.

Bettencourt v. Massachusetts Bd. of Registration in Medicine, 904 F.2d 772, 777 (1st Cir. 1990).

abstention, when a case is properly within the *Younger* category of cases, there is no discretion on the part of the federal court to grant injunctive relief"); *Seneca-Cayuga Tribe of Okla. v. State ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989)("*Younger* abstention is not discretionary once the conditions are met"). This is so even when the Court is faced with a claim of pre-emption. *NOPSI*, 491 U.S. at 364-65. More recently, in *NOPSI*, this Court held that even where a party raises a pre-emption claim and seeks to enjoin an ongoing state administrative proceeding that is judicial in nature, *Younger* abstention is nevertheless required:[3]

> [The appellant contends that] a district court presented with a pre-emption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it. *We disagree*.

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[3] While this Court in *NOPSI* affirmed the principles of comity and federalism, and the application of *Younger* if the case met the criteria for abstention, it ultimately held that *Younger* did not apply because the proceedings at issue were not judicial in nature. *NOPSI*, 491 U.S. at 367-73.

Id. (emphasis added). In rejecting the appellant's argument in *NOPSI*, this Court again voiced its concern for comity and federalism:

> [t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.

Id. at 365.

The present case clearly falls within the parameters of *Younger* and *Dayton Christian Schools*: The proceedings before the Commission were ongoing at the time Chaulk sought injunctive relief from the District Court, the proceedings that it sought to enjoin are judicial in nature, and protecting the public from unlawful gender discrimination has been unequivocally recognized by this Court as an important state interest. *See Dayton Christian Schools*, 477 U.S. at 628 ("the elimination of prohibited sex discrimination is a sufficiently important state interest"). The decision of the lower court, however, initially (and incorrectly) addressed the merits of

Chaulk's pre-emption claim, and only considered the appropriateness of *Younger* abstention as an afterthought. Pet. App. 15A, 29A. In doing so, the lower court disregarded *Younger* and its progeny, and violated principles of comity and federalism. As such, the Court should grant the petition to correct this error and uphold the longstanding principles of comity and federalism.

B. The "Facially Conclusive" Language in *NOPSI* Has Created Great Confusion and Inconsistencies Among the Courts.

Although *NOPSI* made it clear that "the mere assertion of a *substantial* constitutional challenge to state action will not alone compel the exercise of federal jurisdiction," this Court left open the possibility that a "facially conclusive" claim of pre-emption trumps *Younger*. *NOPSI*, 491 U.S. at 365 (emphasis added). In *NOPSI*, the appellant argued that "even if a *substantial* claim of federal pre-emption is not sufficient to render abstention inappropriate, at least a *facially conclusive* claim is." *Id.* at 367. (emphasis in original). In response to this

argument, this Court stated, "*[p]erhaps so* . . . [b]ut we do not have to decide the matter here, since the proceeding and order at issue do not meet that description." *Id.* (emphasis added). This Court in *NOPSI* further elaborated that in order for a pre-emption claim to be facially conclusive, a court must be able to "conclusively say [that the pre-emption claim is facially conclusive] *without further factual inquiry* - and what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination." *Id.* (emphasis added).

This portion of *NOPSI* has caused confusion and inconsistency in the lower federal courts. *See Martin Marietta Corp. v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1404 (4th Cir. 1994)(finding *Younger* abstention proper and refusing to address whether a facially conclusive or readily apparent claim of pre-emption would bar abstention, because *NOPSI* did not resolve the issue); *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991)("*NOPSI* suggests that a federal court could hear a case to

interpret the preemptive federal law without making any factual findings"); *H.P Hood, Inc. v. Comm'r of Agriculture*, 764 F. Supp. 662, 675 (D. Me. 1991)(*NOPSI* "did not clarify the practical difference between the two standards [of '"substantial" and "facially conclusive"' or '"flagrantly and patently violative"']"); *Fuller v. Bartlett*, 894 F. Supp. 874, 880 (D. Md. 1995)("neither the Supreme Court nor the Fourth Circuit has yet decided the issue").

Adding to the confusion and inconsistency resulting from the *NOPSI* decision, the Ninth and Eleventh Circuits have eased the strict "facially conclusive" standard by adopting NLRA pre-emption principles[4] and applying a "readily

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[4] In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-749 (1985) this Court articulated two distinct NLRA pre-emption principles: "*Garmon*" pre-emption and "*Machinists*" pre-emption. The *Garmon* pre-emption principle arose from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, which forbids state and local regulation of activities that constitute an unfair labor practice under § 158. The *Garmon* pre-emption doctrine also prohibits regulation of activities that the NLRA *arguably* protects or forbids: "This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation.'" *Building & Trades Council v. Associated Builders*, 507 U.S. 218, 225 (1993) (quoting *Garmon*, 359 U.S. at 247). There are, however, two exceptions to this pre-emption doctrine: Activities which are "merely peripheral concern[s]" of the NLRA and conduct which "touch[es] interests so deeply rooted in

apparent" test[5] to determine whether a pre-emption claim overrides *Younger* abstention. *See Baggett v. Department of Professional Regulation, Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983)("[w]hen pre-emption is readily apparent . . . and state tribunal is acting beyond the lawful limits of authority, abstention can serve no principle of comity"); *Bud Antle, Inc. v. Barbosa*, 35 F.3d 1355, 1365 (9th Cir. 1994), *modified*, 45 F.3d 1261 (9th Cir. 1994)(*Younger* abstention improper where "the state tribunal is acting beyond the lawful

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local feeling and responsibility" may continue to be regulated by state law and are not pre-empted by the NLRA. *Garmon*, 359 U.S. at 243-244.

The "*Machinists*" pre-emption doctrine prohibits state and municipal regulation of areas that have been left "to be controlled by the free play of economic forces." *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1959). "*Machinists* pre-emption . . . precludes state and municipal regulation 'concerning conduct that Congress intended to be unregulated.'" *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) (quoting *Metropolitan Life*, 471 U.S. at 749). *Machinists* pre-emption maintains Congress' "intentional balance 'between the uncontrolled power of management and labor to further their respective interests.'" *Id.* at 416 (citations omitted).

[5] *NOPSI* specifically stated that a *substantial* claim of pre-emption will not evoke federal jurisdiction in face of *Younger* abstention. *NOPSI*, 491 U.S. at 364 (Court rejected notion that a district court should "take a quick look" at the merits of substantial claim of preemption).

limits of its authority" and pre-emption is "readily apparent"). *See also Sycun Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994)(*Younger* abstention inappropriate where pre-emption is readily apparent and state tribunal is acting beyond its authority); *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991)(same).

The majority opinion below shows that the "facially conclusive" language in *NOPSI*, when considered with the "readily apparent" standard created by the Ninth and Eleventh Circuits, has created substantial confusion in the lower courts. In its decision, the Court of Appeals commingled the two standards and ultimately held that "it is 'readily apparent' that the Commission is acting beyond its jurisdictional authority by entertaining Doulamis's complaint, for it is readily apparent that Chaulk's conduct at issue is at least arguably prohibited by, and thus subject to the NLRA." Pet. App. 36A. In arriving at this conclusion, the lower court first considered whether it is "readily apparent" that the NLRA preempts state anti-discrimination laws. Pet. App. 13A, 25A. After holding

that it does, the lower court then addressed the threshold issue of *Younger* abstention, but recognized that "even the *NOPSI* decision leaves open the possibility that a 'facially conclusive' claim of pre-emption might render abstention inappropriate." Pet. App. 35A. The manner in which the majority of the lower court reached its decision, and the conflicting decisions rendered by other courts following *NOPSI*, demonstrate the compelling need for the Court to settle the issue. For these reasons, the Court should grant the petition to resolve and clarify the issue whether a "facially conclusive" or "readily apparent" claim of pre-emption trumps *Younger* abstention.

C. The Decision Below Undercuts the Principles of *Younger* and Its Progeny.

The possibility that a "facially conclusive" claim of pre-emption may trump the requirements of *Younger* abstention violates the principles of comity and federalism consistently recognized by this Court. *Younger* was based on the "vital consideration" of the proper respect for the fundamental role of States in our federal system and the legitimate activities of the

States. *Younger*, 401 U.S. at 44. These principles of comity and federalism require courts to withhold equitable relief in cases that fall under *Younger* and its progeny to avoid undue interference in pending state proceedings. *Id.* at 45; *NOPSI*, 491 U.S. at 359.

Allowing a "facially conclusive" pre-emption claim to trump *Younger* subverts the underlying principles of *Younger*. In *NOPSI*, 491 U.S. at 364-365, this Court rejected an argument that "a district court presented with a pre-emption based request for equitable relief should take a quick look at the merits; and if upon that the look the claim appears substantial, the court should endeavor to resolve it." The Court should likewise reject the concept that a facially conclusive claim of pre-emption trumps the requirement of *Younger* abstention. A federal court that fails to abstain under *Younger* where a party raises a facially conclusive pre-emption claim prevents state courts from exercising proper jurisdiction over matters of great local concern, such as enforcing state anti-discrimination laws. State courts are equally equipped to

address federal questions such as pre-emption raised by parties as a defense. *See Dayton Christian Schools*, 619 U.S. at 629 ("constitutional claims may be raised in state-court judicial review of the administrative proceedings"); *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. at 173-177, 375 N.E.2d at 1201-1203 (finding that the NLRA does not pre-empt Massachusetts anti-discrimination laws). Since a "facially conclusive" exception to *Younger* undermines the longstanding principles of comity and federalism, and state courts are competent to decide pre-emption claims, the Court should grant the petition to decide whether *Younger* abstention should be enforced regardless of any pre-emption claim.

II. THE NLRA DOES NOT PRE-EMPT STATE ANTI-DISCRIMINATION LAWS.

This case also presents a question of national significance concerning whether the NLRA pre-empts state anti-discrimination laws. The Court should grant the petition to resolve the conflict between the First Circuit and the

Massachusetts Supreme Judicial Court on this issue. The Court should also grant the petition to settle the important federal issue whether Congress intended that the NLRA pre-empt state anti-discrimination laws where an employee claims an unfair labor practices and gender discrimination against an employer.

A. The Majority Decision Below Conflicts with a Decision by the Supreme Judicial Court of Massachusetts.

The Court should grant the petition because the majority opinion below conflicts with a decision by the Massachusetts Supreme Judicial Court. While the majority opinion below held that it is "readily apparent" and "facially conclusive" that the NLRA pre-empts state anti-discrimination laws, the Massachusetts Supreme Judicial Court rejected a similar argument by an employer against the Commission that chapter 151B was pre-empted by the NLRA. In *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 Mass. at 173-177, 375 N.E.2d at 1201-1203, the Supreme Judicial Court held that the exclusion of pregnancy-related

disabilities from a comprehensive disability plan constituted gender discrimination in violation of the Massachusetts anti-discrimination laws. The employer, however, argued that the unlawful practices provision of the Massachusetts anti-discrimination laws, Mass. G.L. c. 151B, § 4, is preempted by the NLRA. *Id.* at 173, 375 N.E.2d at 1202. The Supreme Judicial Court rejected the employer's argument and ruled that "[d]iscrimination in employment opportunity is generally considered to be a 'peripheral concern' of the National Labor Relations Act, and thus *State anti-discrimination statutes are not preempted by Federal labor law.*" *Id.* at 174, 375 N.E.2d at 1202 (emphasis added).

The majority decision below directly conflicts with the holding in *Massachusetts Elec. Co.* A conflict between decisions of state and federal courts within the same jurisdiction raises the concern of forum shopping. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The Court has, accordingly, granted petitions for certiorari to resolve such conflicts and thereby prevent forum shopping. *See e.g. Atkins*

v. Rivera, 477 U.S. 154, 156 (1986)(Court granted certiorari to resolve conflict between rulings by Massachusetts Supreme Judicial Court and two Federal Courts of Appeals); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 119 (1982)(Court entertained appeal where decision by Court of Appeals for the First Circuit conflicted with a decision of Massachusetts Supreme Judicial Court). The conflict created by the majority decision below should be resolved by this Court as well.

B. State Anti-Discrimination Laws Are Not Pre-empted by the NLRA.

The Court should also grant the petition because the court below incorrectly held that the NLRA pre-empts state anti-discrimination laws. The relevant state statute, Mass. G.L. c. 151B, § 3, prohibits discrimination based on "race, color, religious creed, national origin, sex, sexual orientation, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person." Pet. App. 99A. *See* Mass. G.L. c. 151B, § 4, Pet.

App. 104A. The scope of prohibited discrimination under the NLRA, 29 U.S.C. § 158, however, pertains to very specific types of discrimination, viz., "in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization." Pet. App. 77A-78A. Section 158(b)(2) of the NLRA also pertains to discrimination against an employee "with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Pet. App. 79A. Nothing in the NLRA contains a clear statement by Congress that it intended to pre-empt the states from prohibiting discrimination based on gender.

The clear statement required for pre-emption rests on fundamental "[p]rinciples of federalism." *Department of Revenue of Or. v. ACF Indus., Inc.*, 114 S. Ct. 843, 850 (1994). When considering pre-emption claims, this Court has shown great solicitude for state sovereignty. *See Seminole Tribe of*

Florida v. Florida, 116 S. Ct. 1114, 1996 WL 134309 at *4 (1996)("each State is a sovereign entity in our federal system"). Because of the importance of the federalist structure of joint sovereigns and the need for "a proper balance between the States and the Federal Government," this Court will not invalidate state law absent clear congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

These principles of federalism also dictate that consideration of pre-emption claims made under the Supremacy Clause begin with the basic "presumption that Congress does *not* intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995)(emphasis added); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"). This strong presumption against pre-emption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the

courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)(citations omitted). Hence, state law is pre-empted only if there is "an unambiguous congressional mandate to that effect," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963), and "it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)(quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Furthermore, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947)(Frankfurter, J., dissenting).

The NLRA does not contain any language--let alone a strong statement--pre-empting state anti-discrimination laws. Although the Court has yet to address this issue, it has ruled that the NLRA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1994), provide concurrent

remedies. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974). The Court has held that "[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48. Thus, "the relationship between [the NLRB and Equal Employment Opportunity Commission] is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50-51.

Because it is clear that Congress did not intend that the NLRA pre-empt Title VII, it is equally unambiguous that Congress did not intend that the NLRA preempt state anti-discrimination laws. Congress intended that the States participate with the Federal government, specifically, the Equal Employment Opportunity Commission (EEOC), in prohibiting alleged discriminatory employment practices. *See* 42 U.S.C. § 2000e-5(c). Title VII expressly provides that claims of gender discrimination in the work place are solely within the Commission's jurisdiction pursuant to G.L. c. 151B, § 3, and

of the EEOC's under 42 U.S.C. § 2000e-5(c). *See* 29 C.F.R. § 1601.13(a)(3)(I)(1995)("In order to give full weight to the policy of section 6(c) of title VII, which affords State and local fair employment practice ["FEP"] agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law, the [EEOC] adopts the following procedures with respect to allegations of discrimination filed with the [EEOC] . . . [i]t is the intent of the [EEOC] to thereby encourage the maximum degree of effectiveness in the State and local agencies"). Pet. App. 160A.

The majority opinion incorrectly held that the NLRA pre-empts state anti-discrimination statutes. This holding presents a serious risk to both state and federal enforcement of civil rights laws. In essence, the majority opinion defeats the jurisdiction of both the Commission and the EEOC to hear and decide claims of discrimination. Thus, the majority opinion below is contrary to congressional intent and undermines the legitimate interests of both state and Federal governments to

enforce state anti-discrimination statutes and Title VII. Accordingly, the Court should grant the petition to answer this crucial federal question.

Conclusion

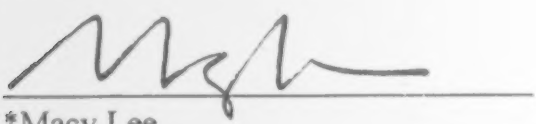
For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,

By its attorneys,

SCOTT HARSHBARGER
ATTORNEY GENERAL



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95-1679

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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Petitioner,

v.

CHAULK SERVICES, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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1690P

PETITION APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 94-12432-RCL

CHAULK SERVICES, INC.,

Plaintiff,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
PETRINA DOULAMIS and
INTERNATIONAL ASSOCIATION OF
EMTs & PARAMEDICS, NAGE, AFL CIO,

Defendants.

Decision by Court. In accordance with allowance of the Defendant's Motion to Dismiss on February 7, 1995;

IT IS ORDERED AND ADJUDGED

Judgment for the Defendants, Massachusetts Commission Against Discrimination, Petrina Doulamis/Sullivan and

International Association of EMTs & Paramedics, Nage, AFL CIO

as against the Plaintiff, Chaulk Services, Inc.

February 8, 1995

Robert J. Smith, Jr.
Clerk

_____

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 94-12432-RCL

CHAULK SERVICES, INC.,

Plaintiff,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
PETRINA DOULAMIS and
INTERNATIONAL ASSOCIATION OF
EMTs & PARAMEDICS, NAGE, AFL CIO,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF

This case is before the Court on a Complaint by Chaulk Services, Inc., hereinafter "Chaulk," seeking a declaratory judgment and injunctive relief against: the Massachusetts

Commission Against Discrimination, hereinafter the "Commission"; Petrina Doulamis/Sullivan, hereinafter "Doulamis," and the International Association of EMTs & Paramedics a/w NAGE, AFL-CIO, hereinafter the "Union." For the reasons set forth below, Chaulk states that its prayer for a preliminary injunction should be granted.

DOCKETED

This court abstains from deciding the plaintiff's preemption claim (raised by way of application for preliminary injunction) in light of the pending state agency proceeding. Younger v. Harris, 401 U.S. 37 (1971); see also Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986); Brotherhood of Locomotive Engineers v. MCAD, 695 F. Supp. 1321 (D. Mass. 1988). For the same reasons, the defendant's motion to dismiss is hereby allowed.

Signed: Reginald C. Lindsay
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 95-1249

CHAULK SERVICES, INC.

Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
PETRINA DOULAMIS/SULLIVAN AND
INTERNATIONAL ASSOCIATION OF EMTs
& PARAMEDICS, NAGE, AFL-CIO,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay,
U.S. District Judge]

Before

Torruella, Chief Judge,

Lynch, Circuit Judge,

and Casellas*, District Judge

Arthur P. Menard, with whom Paul J. Murphy and Menard Murphy & Walsh were on brief for appellant.

Macy Lee, Assistant Attorney General, with whom Scott Harshbarger, Attorney General of Massachusetts, was on brief for appellee Massachusetts Commission Against Discrimination; Katherine McClure on brief for appellees Petrina Doulamis/Sullivan and International Association of EMTs & Paramedics, NAGE and AFL-CIO.

November 27, 1995

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*of the District of Puerto Rico,
sitting by designation.

CASELLAS, District Judge. Plaintiff-appellant Chaulk Services, Inc. ("Chaulk") originally brought this action for declaratory judgment, preliminary and permanent injunctive relief against the Massachusetts Commission Against Discrimination ("MCAD") ("the Commission"), Petrina Doulamis/Sullivan ("Doulamis") and the International Association of EMTs & Paramedics, NAGE, AFL-CIO ("the Union"), to prevent defendants-appellees from proceeding with the case of Doulamis v. Chaulk Services, Inc., 93-BEM-2145, then pending before the MCAD, on the basis that the action was preempted by federal law, particularly, the National Labor Relations Act ("NLRA") ("the Act"), 29 U.S.C. ¶ 151 et seq. The district court abstained from deciding Chaulk's preemption claim, citing Younger v. Harris, 401 U.S. 37 (1971), Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) and Brotherhood of Locomotive Engineers v. MCAD, 695 F. Supp. 1321 (D. Mass. 1988), and consequently dismissed Chaulk's complaint. We vacate the judgment below and remand the case to the district court.

I. STATEMENT OF THE CASE

A. Facts

In the middle of 1993, the International Association of EMTs and Paramedics, NAGE, AFL-CIO, began a union organization campaign at Chaulk. Doulamis became involved in the campaign sometime during the fall of 1993, when she and Eric Burgess, a male Chaulk employee, wrote a letter to the president of Chaulk's parent company calling for the organization of a union. On November 10, 1993, Chaulk's CEO Nicholas O'Neil and Joseph Gilmore, vice-present, as part of their own campaign against the union organization effort, met with Doulamis in an attempt to pressure her into becoming a non-union advocate. Doulamis declined their invitation.

As a result of this meeting, the Union filed unfair labor practice charges on November 29, 1993 with the National Labor Relations Board ("NLRB") against Chaulk, claiming that it coerced and intimidated Doulamis, a known union organizer, by questioning her regarding union activities and threatening

retaliation for those union activities, in violation of the Act. On December 6 and 9, 1993, the Union filed two additional charges with the NLRB, both of which alleged that Chaulk interfered with Doulamis' labor activity rights and discriminated against her because of her union organization efforts.[1]

Thereafter, the NLRB issued a complaint against Chaulk alleging specific violations of ¶¶ 8(a)(1) and (3) of the NLRA, and charging that Chaulk had interfered with, restrained and coerced several employees, including Doulamis, in the exercise of rights guaranteed by ¶ 7 of the Act. With respect to Doulamis, the complaint alleged that on November 29, 1993 Chaulk issued a written warning and on December 7, 1993 issued a letter addressed to Doulamis threatening her with discipline if she attended any

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[1] The Union filed several additional unfair labor practice charges against Chaulk stemming from its alleged interference with the protected rights of numerous other employees. Here, we refer in particular only to those which, according to the parties, involve charges of unlawful conduct directed against Doulamis. Furthermore, while Doulamis is not named as the aggrieved employee in these charges, both parties agree that the employee referred to therein is, in fact, Doulamis.

further 401(K) meetings held by Chaulk with its employees. In addition, the complaint charged that on December 2, 1993, Chaulk suspended the coauthor of the pro-union letter, Eric Burgess. According to the complaint, Chaulk engaged in this conduct because it mistakenly believed that Doulamis, together with several of her fellow employees, had engaged in misconduct arising out of union or other protected concerted activity. See Complaint and Notice of Hearing at ¶¶ 7-8. It is also alleged that these employees formed, joined and assisted the Union and otherwise engaged in concerted activities, and that Chaulk's conduct was a deliberate attempt to discourage the employees from engaging in these activities, in violation of sections 8(a)(3) and (1) of the Act. See Complaint and Notice of Hearing at ¶¶ 7-10.

A full and comprehensive settlement agreement was reached between Chaulk and the NLRB in March 1995 regarding these claims. As part of the settlement, Chaulk agreed to, inter alia , expunge from its files any reference to the transfer of Eric Burgess; the written warnings set forth in the complaints of

Doulamis, Richard Graham, Chris Adler, Gary Winitzer, Jim Taubert and Jean Taubert; the suspension of Eric Burgess, Chris Adler, Jim Taubert, Jean Taubert, Gary Winitzer, Michael Cook, Kathryn Edwards and James McLaughlin; and the terminations of Fran Wilkerson, John Borden and McLaughlin. In addition, Chaulk agreed to pay out approximately $12,000 in back pay to these employees.

Meanwhile, on December 1, 1993, after the Union had already filed its first charge with the NLRB, Doulamis filed a complaint with the MCAD against Chaulk, claiming she had been a victim of unlawful sex discrimination. Specifically, she complained of being harassed about her union activity, allegedly because of her gender, in that the "males who are also involved [in the union activity] are not being harassed."

On February 18, 1994, Chaulk moved to dismiss Doulamis' complaint at the MCAD for lack of jurisdiction, on the grounds that it was preempted by federal law. On May 13, 1994, the MCAD issued an order denying the motion to dismiss and

retaining jurisdiction over Doulamis' discrimination claims, reasoning that it did not have to address the merits of the underlying labor dispute in order to resolve the allegations of gender discrimination. The Commission then promptly issued a set of interrogatories to Chaulk, requesting detailed information about all known union organizers, their role in organizing efforts and any significant acts of union organizing known to appellant, including copies of any communications between Chaulk and Doulamis relative to the union organization effort.

B. Proceedings Below

The present action was filed in the United States District Court for the District of Massachusetts on December 8, 1994, seeking a declaratory judgment as well as an injunction barring the continued prosecution of Doulamis' complaint before the MCAD. Chaulk claimed that the Commission's assertion of state authority over her charge directly threatened and significantly interfered with the jurisdiction of the NLRB. As noted above, the district court granted MCAD's motion to dismiss on abstention grounds. It did

not decide the preemption issue. Chaulk now appeals the district court's judgment.

II. ANALYSIS

A. Preemption

Relying on the doctrine of preemption first enunciated in San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), appellant argues that the district court erred in allowing the Commission's motion to dismiss on the grounds of Younger abstention and that it should have decided the preemption issue. Citing primarily to Bud Antle, Inc. v. Barbosa, 35 F.3d 1355 (9th Cir. 1994), Chaulk asserts that when it is clear that the state tribunal is acting beyond the lawful limits of its authority, there is no principle of comity that is served by abstention. Id. at 1356. Accordingly, it urges us to find the Younger abstention doctrine inapplicable to this case, address the merits of its preemption claim, and declare that appellee's charge of sex discrimination before the Commission is indeed preempted by federal law.

We begin by delineating the present scope of the so called

Garmon preemption doctrine. The Supreme Court held in Garmon that when an activity is arguably subject to ¶ 7 or ¶ 8 of the National Labor Relations Act, the states as well as the federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national labor policy is to be averted. Id. at 245. When Congress enacted the NLRA, it enacted comprehensive procedural rules and created the NLRB to administer this specially designed regulatory structure. The result was a complex and interrelated scheme of federal law, remedies and administration designed to achieve uniformity in our national labor policy. Garmon, 359 U.S. at 242; New York Telephone Co. v. New York Dept. of Labor, 440 U.S. 519, 527 (1979); Jones v. Truck Drivers Local Union No. 299, 838 F.2d 856, 872 (6th Cir. 1988) (Merritt, J., concurring in part and dissenting in part).

In order to achieve the desired uniformity, Congress entrusted the interpretation and enforcement of the NLRA to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative

experience. See Garmon, 359 U.S. at 242. This administrative scheme was designed to avoid the danger of conflicting or incompatible adjudications such as would inevitably result from having multiple forums, with their diverse procedures, entertain claims under the NLRA. Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485, 490-91 (1953). The Garmon rule is therefore intended to preclude state interference with the NLRB's interpretation and enforcement of the integrated scheme of regulation established by the NLRA. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986).

Withal, the Garmon rule admits of some exceptions to the NLRB's primary jurisdiction. For instance, where the conduct at issue is of only "peripheral concern" to federal labor policy, the states are not precluded from regulating the activity. Garmon, 359 U.S. at 243. Similarly, state action is not preempted where the regulated conduct touches interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has

deprived the states of the power to act." Id.[2]

When called to determine whether those exceptions apply, courts must balance the state's interest in remedying the effects of the challenged conduct against both the interference with the NLRB's ability to adjudicate the controversy and the risk that the state will approve conduct that the NLRA prohibits. Belknap, Inc. v. Hale, 463 U.S. 491, 498-499 (1983); NLRB v. State of Ill. Dept. of Emp. Sec., 988 F.2d 735, 739 (7th Cir. 1993). In doing so, we intentionally focus on the conduct at the root of this controversy, namely Chaulk's alleged interference with Doulamis' union activities, as opposed to the descriptive title of sex discrimination

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[2] Courts have recognized a third exception to the Garmon doctrine where Congress has expressly carved out such an exception to the NLRB's primary jurisdiction. See Tamburello v. Comm-Tract Corporation, No. 95-1295, slip op. at 6 (1st Cir. October 2, 1995) (citing Vaca v. Sipes, 386 U.S. 171, 179-80 (1967); Brennan v. Chesnut, 973 F.2d 644, 646 (8th Cir. 1992)). Congress has not made an exception to the NLRB's primary jurisdiction for claims alleging sex discrimination in the context of an unfair labor practice. See Jones v. Truck Drivers Local Union, 838 F.2d at 861 (sexual discrimination is a breach of duty of fair representation and within scope of † 8 of the NLRA); NLRB v. Local 106, 520 F.2d 693 (6th Cir. 1975) (same). This exception therefore does not apply to the facts in this case.

given to her cause of action before the MCAD. That is because preemption is designed to shield the system from conflicting regulation of conduct. "It is the conduct being regulated, not the formal description of governing legal standards that is the proper focus of concern." Amalgamated Ass'n of St., E.R. & M. C. Emp. v. Lockridge, 403 U.S. 274, 292 (1971). See also, Garmon, 359 U.S. at 246 ("It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction").

Doulamis' complaint highlights the risk that a state cause of action will touch on an area of primary federal concern. She complains of incidents of interference with her union activities as a union organizer. The very same conduct provides the factual basis for the unfair labor practice charges brought by the Union on her behalf, which were eventually incorporated into the complaint and notice of hearing issued by the NLRB. Her claims are fundamentally grounded in an assertion that the rights which her employer interfered with involve her union activity. Where, as

here, the case involves conduct arguably prohibited by ¶ 8 of the Act, the NLRB has broad authority to determine the appropriate remedy for wronged employees.[3] "In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the state to grant a remedy here which has been withheld from the NLRB only accentuates the danger of conflict." Garmon, 359 U.S. at 247; Richardson v. Kruchko & Fries, 966 F.2d 153, 157 (4th Cir. 1992). Board authority over claims of interference with union activities is not merely of peripheral concern to the Act. Rather, the Board's authority to remedy such practices is central to its purpose. See Tamburello v. Comm-Tract Corporation, No. 95-1295, slip op. at 9 n. 5 (1st Cir. October 2, 1995).

Moreover, the fact that the Union clearly considered

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[3] MCAD presses the argument that gender-based discrimination is not even within the realm of prohibited activities under the NLRA. According to MCAD, the scope of prohibited discrimination under the Act is limited to discrimination based on union activities or membership. Still, the argument has been made successfully that sexual discrimination constitutes an unfair labor practice under ¶ 8 of the NLRA. See Jones v. Truck Drivers Local Union, 838 F.2d at 861 (sexual discrimination is a breach of duty of fair representation and within scope of ¶ 8 of the NLRA); NLRB v. Local 106, 520 F.2d 693 (6th Cir. 1975) (same).

Chaulk's conduct an unfair labor practice, and that the Board entertained such charges, only buttresses the Court's conclusion that said conduct is not only "arguably", but obviously prohibited under section 8(a) of the NLRA. It also highlights the very real danger of interference with the NLRB's jurisdiction, as it was precisely the Board's timely intervention which in this case led to the agreement through which Chaulk pledged, among other things, not to engage in the challenged conduct, or take similar actions to hinder its employees in their union activities.

Significantly, the Supreme Court has held that in cases where the underlying conduct is arguably prohibited by the NLRA, application of the so-called "local interests" exception hinges, in the first place, upon the existence of a significant state interest in protecting its citizens from the challenged conduct. In second place, the controversy which could be presented to the state court must be different from that which could have been presented to the NLRB. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 196-97 (1978). See also, Tamburello

v. Comm-Tract Corporation, No. 95-1295, slip op. at 14 (1st Cir. October 2, 1995).

Under the Sears rationale, the critical inquiry is whether the controversy presented to the state court is identical to or different from that which could have been presented to the NLRB.[4] Sears, 436 U.S. at 197. The Court reasoned that it is only in the former situation that a state's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the Garmon doctrine was designed to avoid. Id. We assume arguendo that the Commonwealth of Massachusetts has a significant interest in protecting its citizens against sex

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[4] We note that Sears is not entirely on point, as it differs from the instant case in at least one fundamental respect. In that case, the Court was presented with a situation where the party seeking relief in the state forum had no right to invoke the Board's jurisdiction and the party that had the right to invoke the Board's jurisdiction had failed to do so. The Court expressed concern that in the circumstances of that case, Sears may not have a chance for a hearing on its claims if state jurisdiction were preempted without any assurance that the dispute might eventually be brought before the NLRB. The Court reasoned that preemption was justified only when an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. Id. at 201. Here, of course, there is no such concern, as the Union filed the unfair labor practice charges with the NLRB even before Doulamis filed her gender discrimination claims before the Commission.

discrimination in their employment. Following the guidelines set forth by the Supreme Court in Sears, we therefore examine whether the controversy before the state forum would indeed be the same as that which could be brought before the NLRB. Id.

In this regard, it is telling that the Union, upon learning of Chaulk's alleged interference with Doulamis' activities as a union organizer, promptly filed an unfair labor practice charge on her behalf, claiming violations of ¶ 8 of the Act--thereby clearly characterizing the controversy as a labor dispute, subject to the NLRB's primary jurisdiction. For its part, the NLRB received the Union's allegations regarding Chaulk's conduct--the same conduct that would later form the basis for Doulamis' discrimination claim before the MCAD--investigated them, proceeded then to issue a Complaint and Notice of Hearing, and eventually settled the matter. Plainly, this is not a case where the NLRB declined to exercise its lawful jurisdiction over a labor controversy, or where the NLRB's actual exercise of jurisdiction remains a matter of speculation. On the contrary, the Board in this case moved

aggressively to acquire such jurisdiction and bring the matter to a full and speedy resolution.

Furthermore, even Doulamis' own pleadings before the Commission couch her claims in terms of a labor dispute within the NLRB's primary jurisdiction. Her complaint accuses Chaulk of harassment "about [her] union activities." She also claims to have been "intimidated by Mr. O'Neil about involvement in union activity" and "accused of distracting the other employees with union activity." As noted above, such conduct on the part of Chaulk, if adequately established through competent evidence, would constitute an undue interference with Doulamis' rights under ¶ 7 of the NLRA and consequently a violation of ¶ 8(a)(1) of the Act. The application of additional remedies to the conduct here at issue only invites conflict. As the Supreme Court stated in Garmon, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." Id. at 247. See Sears, Roebuck & Co., 436 U.S. at 193-94 ("[T]he pertinent inquiry is whether the two

potentially conflicting statutes [are] brought to bear on precisely the same conduct.") (citations omitted). As discussed above, Doulamis' claim of sex discrimination is founded upon the identical facts which provided the basis for the unfair labor practices charge brought on her behalf by the Union. Accordingly, under the Garmon rationale, her claim before the Commission is expressly preempted.

Moreover, as pointed out by Chaulk, the interrogatory issued by the MCAD in the course of the investigation and prosecution of Doulamis' case belies the Commission's assertion that it need not delve into the labor aspects of the controversy in order to dispose of her gender discrimination claims. Rather, the interrogatory is further proof that issues of labor law ordinarily considered to be within the NLRB's primary jurisdiction are precisely the type of questions that lie at the heart of this controversy.

Finally, in order to determine the merits of Doulamis' claims of sex discrimination, the MCAD will have to decide

whether in fact Doulamis was engaged in protected union activity, and if so, whether she was engaged in the same type of union activity as the other union organizers. Such a finding requires that the MCAD become embroiled in a factual and legal determination of what constitutes union activity, a task which has been expressly reserved to the jurisdiction of the NLRB. More importantly, if the Commission were allowed to entertain Doulamis' claim of sexual discrimination, there is the potential risk that it will incorrectly apply the substantive rules governing labor controversies laid out by Congress in the NLRA. It is precisely this potential for incompatible or conflicting adjudications that Congress sought to avoid by leaving these determinations in the first instance to the NLRB.

In the end, no recharacterization of this claim can obscure the fact that, at bottom, this is a classic example of an unfair labor practice claim of the kind traditionally handled in the first instance by the NLRB. Since the controversy before the MCAD and that resolved by the NLRB are the same in a fundamental respect, and

the risk of interference with the Board's jurisdiction is obvious and substantial, we hold that the MCAD has no jurisdiction to entertain Doulamis' charge of sexual discrimination based on her employer's alleged interference with her union activities. International Union of Operating Engineers v. Jones, 460 U.S. 669, 674 (1983).[5]

B. Abstention

We turn now to what is in essence the threshold issue in this appeal-whether the district court erred in abstaining under the Younger doctrine. In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that a federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great and

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[5] The dissent devotes a considerable number of pages to the issue of whether Title VII and the NLRA provide concurrent remedies. The Supreme Court has made clear however, that when a state proceeding is claimed to be preempted by the NLRA under Garmon, the issue is a choice-of-forum rather than a choice-of-law question. See International Longshoremen's Association v. Davis, 476 U.S. 380, 391 (1986). As such, "it is a question whether the State or the Board has jurisdiction over the dispute." Id. If--as here--there is preemption under Garmon, then state jurisdiction is extinguished. Id. See also, International Union of Operating Engineers v. Jones, 460 U.S. at 680-81; Sears, 436 U.S. at 199 n. 29; Garmon, 359 U.S. at 245.

immediate irreparable injury. Younger stands for the proposition that principles of comity require "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States are left free to perform their separate functions in their separate ways." Id. at 44. The Court has since applied its reasoning in Younger to civil proceedings in which important state interests are involved. See Hoffman v. Pursue, Ltd., 420 U.S. 592 (1975); Juidice v. Vail, 430 U.S. 327 (1977); Trainor v. Hernandez, 431 U.S. 434 (1977).

In Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986), the principles of comity first announced in Younger were made extensive to state administrative proceedings. As a result, where (1) vital state interests are involved, (2) in an ongoing state judicial (or administrative) proceeding, a federal court should abstain from exercising its jurisdiction over a claim, (3) unless state law clearly bars the interposition of the

constitutional claims. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Moore v. Sims, 442 U.S. 415 (1979). "The pertinent inquiry is whether state proceedings afford an adequate opportunity to raise the constitutional claims." Middlesex, supra.

The dissent asserts that, rather than a principle of discretionary deference, Younger abstention requires a district court to abstain whenever a case falls within the doctrine's parameters. To the extent it relies on the Supreme Court's decision in Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 n. 22 as support for this blanket rule, however, we respectfully differ. The cited passage on which the dissent relies clearly refers to that category of cases where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. And even for that category of cases, the Supreme Court makes clear that abstention is only appropriate absent bad faith, harassment, or a patently invalid state statute. Id. at 816. In fact, Colorado River strongly reaffirmed the basic

principle that abstention from the exercise of federal jurisdiction is the exception, not the rule:

> The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.

Colorado River, 424 U.S. at 813-14 (emphasis supplied; citations omitted). See also New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989).

The Commission argues that the case at bar fits squarely within the principles of Younger abstention. We disagree. First the procedural posture of this case differs from that of the customary case where abstention is traditionally applied. Ordinarily, federal courts abstain from the exercise of jurisdiction

over a particular controversy out of respect for an ongoing state proceeding begun before the federal action. It is thought that this procedural mechanism forestalls the friction that can arise when the business of the two systems--state and federal--overlaps. But the notion of comity, which to a great extent underlies the Younger doctrine of abstention, must accommodate the legitimate interests of both the state and national governments. Younger, 401 U.S. at 44; Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10 (1987).

In abstaining, the court below seemingly focused on the situation that existed on December 8, 1994, when Chaulk's complaint for declaratory and injunctive relief was filed in the United States District Court for the District of Massachusetts. In doing so however, the court ignored the fact that an unfair labor practice charge, based on the same facts underlying Doulamis' complaint of sex discrimination, had been filed against Chaulk prior to her discrimination claims and was pending before the NLRB at the time of the filing of her action before the Commission. In addition, shortly after Doulamis filed her action,

additional charges were filed by the Union, and the Board continued to exercise its jurisdiction over these claims.

Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. Alabama Public Service Commission v. Southern Railroad Co., 341 U.S. 341 (1951). But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in a conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. American Federation of Labor v. Watson, 327 U.S. 582, 593-95 (1946); Bowles v. Willingham, 321 U.S. 503, 510-11 (1944); Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456, 468-70 (1943).

This case is similar to Freehold Cogeneration Associates, LP v. Board of Regulatory Commissioners of New Jersey, 44 F.3d 1178 (3d Cir. 1995). In that case, Freehold sought a declaratory judgment in the United States District Court for the District of

New Jersey that the Board of Regulatory Commissioners of the State of New Jersey ("BRC") was preempted by the Federal Public Utility Regulatory Policies Act ("PURPA") from modifying the terms of a previously approved power purchase agreement between Freehold and Jersey Central Power and Light Company ("JCP&L"), a New Jersey public utility. Freehold also sought an order enjoining the ongoing BRC proceedings. The district court dismissed for lack of subject matter jurisdiction. On appeal, one of the arguments raised by JCP&L was that the federal court should abstain from resolving the merits of the case even if it was found to possess subject matter jurisdiction. The Third Circuit rejected the argument saying:

> [O]ur concern is with carrying out a federal statutory scheme promoting the development of alternative energy sources. The alleged intrusive action is not by the federal government, but, on the contrary, by a state regulatory agency. We conclude that abstention is not appropriate in this case and does not warrant any extended discussion.

Freehold Cogeneration, 44 F.3d at 1187 n.6. As in Freehold, we are concerned here with carrying out a federal statutory scheme, in

this case on promoting the development of a uniform national labor policy. The alleged intrusive action is not by the federal government, but by the MCAD's purported regulation of conduct within the NLRB's jurisdiction.

We note that in the particular context of this case, the application of Younger abstention would result in significant prejudice to Chaulk, who entered into a comprehensive settlement agreement with the NLRB through which all unfair labor practice claims were resolved, subject to Chaulk's compliance with the conditions set forth therein, only to be faced with the prospect of having to defend its actions once again, this time before a state forum. Such an expansive interpretation of the abstention doctrine would have the effect of encouraging duplicative litigation, with the resultant waste of judicial and administrative resources, as well as the danger to federal-state relations that could result from conflicting adjudications.

Under these circumstances, where a federal agency with primary jurisdiction over the controversy has already exercised

said jurisdiction, it would be inconsistent with the above mentioned principles of comity and equal respect for the interests of both the federal and state government for a federal court to abstain on Younger grounds from deciding a claim properly before it, in order to give way to a state administrative action filed after the federal proceedings are underway. Put simply, comity works both ways.

The Commission nevertheless urges us to extend the application of Younger and its progeny to the circumstances of this case. To this end, MCAD argues that the facts before us satisfy the relevant three part test set out by the Supreme Court in Middlesex, 457 U.S. at 432. As it is however, even an analysis of the case within this framework leads us to the same conclusion. Abstention was improper in this case. We explain.

A number of courts have held that Younger abstention is inappropriate where a claim of preemption is "facially conclusive" or "readily apparent", because no significant state interests are served when it is clear that the state tribunal is acting beyond the

lawful limits of its authority. Bud Antle, Inc. v. Barbosa, 35 F.3d 1355, 1365-66 (9th Cir. 1994), as amended by, 45 F.3d 1261, 1272-73 (9th Cir. 1994); Gartrell Construction, Inc. v. Aubry, 940 F.2d 437, 441 (9th Cir. 1991) (citing Champion International Corp. v. Brown, 731 F.2d 1406 (9th Cir. 1984); National R.R. Passenger Corp. v. Florida, 929 F.2d 1532, 1537, n.12 (11th Cir. 1991) (citing Bagget v. Department of Professional Registration, 717 F.2d 521, 524 (11th Cir. 1983)); Southwestern Bell Tel. v. Ark. Public Service Commission, 824 F.2d 672, 673 (8th Cir. 1987); Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 791 F. 2d 1111, 1115 (3rd Cir. 1986). Chaulk asserts that the Commission is patently acting beyond its jurisdictional boundaries and therefore, no principle of comity precluded the district court from entertaining its claim of preemption on the merits. In response, the Commission cites the Supreme Court's decision in New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) ("NOPSI") for the proposition that the mere assertion of a substantial constitutional challenge to state

action, such as an argument of federal preemption engenders, will not alone compel the exercise of federal jurisdiction. Whatever the merits of MCAD's assertion however, even the NOPSI decision leaves open the possibility that a "facially conclusive" claim of preemption might render abstention inappropriate. Id. at 367. Consequently, we examine the merits of Chaulk's contention that abstention is also inappropriate because preemption is readily apparent in this context.

We have explained above the particularities of Doulamis' claims before the Commission. She complains of incidents of interference with her union activities as a union organizer. We have observed that the very same conduct provided the factual basis for the unfair labor practice charges brought by the Union on her behalf. We have also highlighted the fact that the NLRB incorporated these charges into a complaint and notice of hearing claiming violations to sections 8(a)(1) and 8(a)(3) of the NLRA. As we have noted, her claims are fundamentally grounded in an assertion that the right which her employer interfered with involve

her union activity.

Under these circumstances, were we to allow Doulamis' state claims to go forward by simply artfully pleading her claim of unfair labor practices as one motivated by a discriminatory animus because of her gender, we would be compromising the NLRB's role as chief arbiter of labor disputes. Indeed, there are few unfair labor practices which could not be similarly repackaged. Similarly aggrieved individuals could use such an opening to bypass the NLRB merely by ascribing a myriad of discriminatory motives to the relevant conduct (i.e. age, race, religious belief, etc.), thereby creating a system of labor dispute adjudication parallel to the NLRB, leaving the state and federal courts to grapple piecemeal with issues Congress intended primarily for NLRB resolution.

Faced with this particular factual scenario, we find that under the Garmon doctrine it is "readily apparent" that the Commission is acting beyond its jurisdictional authority by entertaining Doulamis' complaint, for it is readily apparent that Chaulk's conduct at issue is at least arguably prohibited by, and

thus subject to the NLRA. Accordingly, we hold that abstention was inappropriate and the district court abused its discretion when it dismissed Chaulk's complaint on the basis of Younger abstention.

III. CONCLUSION

In sum, pursuant to the Garmon preemption doctrine, we find that Ms. Doulamis' claims are preempted by the NLRA, thereby depriving the MCAD of jurisdiction to entertain her action based on gender discrimination. In addition, we find that abstention was inappropriate in this case, as the principles of comity and of equal respect for state and federal functions weighed against such an abdication of federal jurisdiction over the present controversy. Accordingly, Chaulk is entitled to injunctive relief, consistent with this opinion.

Finally, with regard to MCAD's argument that the Eleventh Amendment bars Chaulk's claims against the Commission, we point out that the Supreme Court has recognized that the Eleventh Amendment does not preclude properly pleaded actions against

state officials when the relief sought is prospective and equitable in nature. See Ex Parte Young, 209 U.S. 123 (1908); Will v. Michigan Department of State Police, 491 U.S. 58 (1989). We therefore reverse the judgment of the district court and remand the case, so that Chaulk may address any pleading deficiencies that currently preclude the continued prosecution of its petition for relief.

Reversed and remanded.

LYNCH, Circuit Judge, dissenting. Because Congress has clearly expressed its intent to allow state anti-discrimination statutes to operate in areas such as this that may overlap with the National Labor Relations Act ("NLRA"), Petrina Doulamis/Sullivan's action is not, I believe, preempted. Because the federal courts are being asked to enjoin the Massachusetts Commission Against Discrimination ("MCAD") from hearing an ongoing gender discrimination action over which the state agency plainly has jurisdiction, I believe that abstention is appropriate. I respectfully dissent.

Under San Diego Building Trades Council, Milkmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959), and its progeny, and in light of the clear congressional mandate under Title VII, 42 U.S.C.A. ¶ 2000e to e-17 (West 1994 & Supp. 1995), that state anti-discrimination statutes have authority over claims for discrimination coextensive with Title VII, Doulamis' MCAD claim coexists with and is not displaced by the federal labor laws. The employer's defense here presents no "facially conclusive" claim for preemption. See New Orleans Public Service, Inc. v. Council of City of New Orleans, 491, U.S. 350, 367 (1989). Garmon preemption is a question over which the state courts have concurrent jurisdiction and Chaulk Services, Inc. ("Chaulk") will have a full and fair opportunity to present the question to the Massachusetts courts. In my view, abstention is required under Younger v. Harris, 401 U.S. 37 (1971).

I.

Garmon says that "[w]hen an activity is arguably subject to ¶ 7 or ¶ 8 of the [NLRA], the States as well as the federal courts

must defer to the exclusive competence of the National Labor Relations Board ["NLRB"] if the danger of state interference with national policy is to be averted." Garmon, 359 U.S. at 245[6] Garmon also says that this principle is not absolute. There is no need to defer to the NLRB where the conduct at issue is of "peripheral concern" to federal labor policy or where the state regulated activities touch "interests . . . deeply rooted in local feeling and responsibility." Id. at 243-44.

The Massachusetts anti-discrimination statute touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [courts cannot] infer that Congress [has] deprived the States of the power to act." Garmon, 359 U.S. at 244. This is so whether or not invidious discrimination in employment can be described as being of "peripheral concern" to the NLRA. Cf. Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination, 375

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[6] Sex discrimination is not specifically addressed in the NLRA and so it is not "clearly prohibited" by ¶ 8 or "clearly protected" by ¶ 7 of the NLRA.

Mass. 160 174 (1978) (employment discrimination of peripheral concern to the NLRA); Walker Mfg. Co. v. Industrial Commission, 27 Wis.2d 669, 681 (1965) (age discrimination of peripheral concern to Labor Management Relations Act). Originally enacted in 1946, the Massachusetts anti-discrimination statute, Mass. Gen. L. ch. 151B, ¶¶ 1-10 (1994), is eighteen years older than Title VII. See 1946 Mass. Acts 368. It regulates conduct in employment in order to carry out the Commonwealth's interest in ensuring that its workplaces are free from particular categories of discrimination. It represents no less an exercise of Massachusetts' police power than building codes or fire regulations. The interests it protects are at least as weighty as the interests sought to be vindicated in actions the Supreme Court has specifically held not preempted by Garmon. See Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (breach of contract and misrepresentation actions by replacement workers); Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977) (infliction of emotional distress); Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53

(1966) (libel).

That chapter 151B touches interests deeply rooted in local feeling and responsibility is not disputed. Rather, the majority asserts that Doulamis' claim is not really a sex discrimination claim, describing Doulamis' claim as the product of "artful[] pleading." With deference, I believe the record establishes that Doulamis' claim is clearly one for sex discrimination and has been treated as such by the MCAD.[7]

On the facts as alleged, Doulamis has stated a claim before MCAD for sex discrimination under chapter 151B. She asserts, inter alia:

> On November 10, 1993, I was harassed about my union activity. I believe the reason is because I am a female. The males who are also involved are not being harassed. Therefore, I charge Respondent with unlawful discrimination against me, in violation of M.G.L. Chapter 151B . . . and Title VII

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[7] Doulamis' claim cannot be preempted simply because the case arises from a labor dispute. The Supreme Court has squarely held that Garmon preemption does not turn on whether a claim arises in the context of a labor dispute. Linn, 383 U.S. at 63 ("Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences.").

> . . . .
> I believe that I am being single[d] out by the Respondent because I am a female. There are numerous other male union organizers who are not being harassed.

That Doulamis asserts a bona fide sex discrimination claim is buttressed by the underlying papers in the pleadings submitted by Chaulk to the district court. Doulamis was apparently a well-respected employee and was featured in Chaulk's publicity materials. From the time she began working at Chaulk in 1990 until the autumn of 1993, Doulamis received no written warnings and no patient complaints. In the middle of 1993, the International Association of EMTs and Paramedics began a union organizing campaign at Chaulk. Although not initially involved, Doulamis became involved in the campaign during the fall of 1993, when she and Eric Burgess, a male Chaulk employee, wrote a letter to the president of Chaulk's parent company calling for organization of a union. On November 10, 1993, Doulamis was called from a training session to meet with the CEO of Chaulk, Nicholas O'Neal, and a vice president, Joseph Gilmore. The two men told Doulamis

at that meeting that she was "pretty" and that they believed that the other employees at Chaulk would listen to her because she was "pretty." They asked her to become a non-union advocate, saying that her physical appearance would persuade other employees to vote against the union. She refused. Shortly thereafter, Doulamis began receiving a series of harassing warnings from Chaulk management about her conduct on the job and her union activities. Burgess, who had co-authored the pro-union letter with Doulamis, did not receive such harassment.

Doulamis believed that she was being singled out for punishment for her union activities because of her sex. The heart of her complaint before the MCAD was that she was being harassed for her union activities while male union organizers -- including one who had co-authored the letter precipitating the harassment -- were not (or at least were not until after Doulamis filed her complaint with the MCAD). This allegation states a prima facie claim of sex discrimination under chapter 151B. See Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass.

673, 679 (1993); see also Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437 (1995).

Under the facts of this case Doulamis could allege two distinct wrongs -- a claim for unfair labor practices and a claim for sex discrimination. Characterizing Doulamis' latter claim as artful pleading assumes away the difficult legal question raised by Doulamis' case and squarely presented in the briefs: whether a sex discrimination claim based on state law is preempted if it arises out of a course of events that also may give rise to an unfair labor practice charge.

The Supreme Court in Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), held that even if a case may come within the scope of the Garmon preemption doctrine when applied in a "mechanical fashion," id. at 188, there is still no preemption over conduct arguably prohibited by the NLRA unless the controversy before the state court is identical to the dispute that could have been presented under the

NLRB. Id. at 197.[8] Doulamis' MCAD claim is not identical to that which could have been heard by the NLRB.

To make out her claim on her chapter 151B action Doulamis needs to show (1) a prima facie case of discrimination and (2) "either that the employer's articulated reasons are a pretext or by direct evidence that the actual motivation was

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[8] At issue in Sears was conduct that could be analyzed in two distinct ways. The conduct was both "arguably protected" and "arguably prohibited" by the NLRA. The Court drew a distinction between those two categories of conduct (although in that case, the same conduct happened to qualify as both) and imposed two distinct lines of analysis. If the activity at issue is "arguably protected," a finding of preemption is required where an aggrieved party has a reasonable opportunity of invoking the NLRB jurisdiction or of inducing his adversary to do so. Id. at 207. If an activity is "arguably prohibited," state jurisdiction is preempted only if the issues presented to the state court are identical to those that could be presented to the NLRB. The latter rubric leaves much more room for state regulation. Id. at 200. Since sex discrimination is clearly not protected by the NLRA, the conduct at issue in this case falls under the more generous "arguably prohibited" rubric.

The majority appears to apply to this case criteria that Sears made applicable to "arguably protected" conduct. For example, in determining that the controversy here is identical to that which could have been put to the NLRB the majority says, "[p]lainly this is not a case where the NLRB declined to exercise its lawful jurisdiction over a labor controversy, or where the NLRB's actual exercise of jurisdiction remains a matter of speculation." Majority Op. at typescript 12; see also Majority Op. at typescript 10 n.4. While this consideration is important to cases involving "arguably protected" conduct, it is not to "arguably prohibited" conduct.

discrimination." Blare, 419 Mass. at 444. The action before the NLRB could not have turned on such an inquiry. Further, the terms of the employer's settlement agreement with the NLRB do not establish that Doulamis' claim before the MCAD is not a bona fide sex discrimination claim.[9]

On the alleged facts of this case -- where Doulamis and Burgess were engaged in the same activity (co-authoring the letter) -- the MCAD will not have to decide as a matter of law whether one of the two was engaged in union activity, while the other was not. In other words, insofar as Doulamis and Burgess were doing the same thing (yet only one was harassed), the question of

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[9] There also seems to be an absence of record support for either the proposition that the sex discrimination action was addressed before the NLRB or the proposition that the settlement is "comprehensive." The settlement agreement, dated March 22, 1995, does not refer to alleged sex discrimination. Also, according to its terms, the agreement applies "only [to] the allegations in the above captioned cases and does not constitute a settlement of any other cases or matters." The "above captioned cases" are docket numbers "1-CA-31196, 31945(2), 32267, 32378, 32504, 32534, 32645, 32661." Only one of those docket numbers, 1-CA-31196, filed December 9, 1993, involves Doulamis. Apparently not included in the settlement are the other two claims that were, according to Chaulk, made by Doulamis: docket numbers 1-CA-31157, filed November 29, 1993 and 1-CA-31181-2, filed December 6, 1993.

whether the activities were protected union activities cancels out of the equation.

This is why the MCAD, when presented with Chaulk's claim of preemption, said:

> In the Complainant's presentation of her discrimination case before this Commission, the 'merits' of the underlying labor dispute need not be resolved. It is not necessary for this Commission to find that the Respondent did, in fact, interfere with the Complainant's efforts to organize union activities; nor is it necessary for a determination to be made regarding the Respondent's anti-union animus, if one should exist. Rather, the Complainant must show that she was treated dissimilarly by the Respondent, and that the impetus for that dissimilar treatment was due to her gender. It is neither the role nor the goal of this Commission to assess the catalyst of the Respondent's actions. It is, however, this Commission's purpose to ensure that such actions are not gender motivated.
>
> In the present case, the Commission may decide the issue in dispute without making a threshold determination of whether the employer had interfered with the employee's union activities. It need only determine whether the treatment the Complainant received, rightly or wrongly, was different from that of her male counterparts and motivated by her gender.

It is in this context that the MCAD's interrogatory must be understood. While it is true that the MCAD has asked Chaulk questions relating to union organizing activities (and has perhaps shown insufficient sensitivity to the possible jurisdictional problem), it has done so for the purpose of determining factually whether Doulamis was treated differently than men for doing the same thing, and not to define legally what is or is not a union activity under the NLRA. As the MCAD has recognized, Doulamis' sex discrimination claim exists independently of any labor law claim. Chaulk's conduct was not wrongful only by virtue of, or with reference to, the labor laws. Cf. Tamburelio v. Comm-Tract Corporation, No. 95-1295, slip op. at 10-11 (1st Cir. October 2, 1995) (RICO claim preempted under Garmon where reviewing court would be forced to decide whether some portion of defendants's conduct violated federal labor laws to determine whether the plaintiff had established a RICO predicate act).[10]

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[10] Significantly, particularly with respect to the Younger issues raised in Part II, any issue concerning whether Doulamis was or was not engaged in union activity will arise in this case, if at all, by way of Chaulk's potential

The Sears inquiry suggests that the MCAD claim does not fall within the scope of Garmon preemption. There is, however, an even more compelling consideration that yields the same conclusion. Of paramount importance in any preemption inquiry, including one under Garmon, is congressional intent. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985) (stating, in discussing NLRA preemption, including Garmon preemption, that "as in any preemption analysis, [t]he purpose of Congress is the ultimate touchstone") (internal quotations omitted). If Congress has clearly evidenced its intent one way or the other on the question of whether states may

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defense to the action -- that Doulamis was treated differently than Burgess and other male organizers because the male organizers were engaged in protected union activity, while Doulamis was not. The Supreme Court has said in the analogous context of ¶ 301 preemption under the Labor Management Relations Act that a defense of preemption is not even a sufficient basis for removal of the action to federal court. See Caterpillar Inc. v. Williams, 482 U.S. 386, 399 (1987) ("[A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.") (emphasis in original).

regulated an area of conduct, federal courts must follow it. Congress has clearly evidenced its belief that state anti-discrimination statutes do not unduly interfere with federal labor policy.

Doulamis' claims not only come under chapter 151B but also come within the scope of Title VII, 42 U.S.C.A. ¶ 2000e to e-17 (West 1994 & Supp. 1995), and are within the jurisdiction of the Equal Employment Opportunity Commission ("EEOC"). She has in fact alleged a violation of Title VII and has indicated in her MCAD complaint that she wishes to have her charges filed with the EEOC.

The Supreme Court has said that the NLRA and Title VII provide concurrent remedies. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974); see also Beverly v. Lone Star Lead Construction Corp., 437 F.2d 1136, 1140 n.22 (5th Cir. 1971); cf. Britt v. Grocers Supply Co., Inc., 978 F.2d 1441, 1447 (5th Cir. 1992) ("[W]e have held that claims under Title VII are not preempted by the NLRA. [Our] cases hold that a remedy is

available under both the NLRA and Title VII and recognize concurrent jurisdiction between Title VII and the NLRA." (footnote omitted)), cert. denied, 113 S. Ct. 2929 (1993); Morgan v. Massachusetts General Hosp., 901 F.2d 186, 194 (1st Cir. 1990) ("Clearly, if an employee has engaged in expression against employer policies, even within the context of union activities, which violate the Civil Rights Act, such as discriminatory treatment of minorities or sexual harassment, and the employee alleges discharge for that expression, section 704(a) [of the Civil Rights Act] would be implicated for the narrow expression-related claims.").[11]

Thus, even accepting the majority's view that the factual basis for the sex discrimination claim provides the same basis for the unfair employment practice claim and that the sex discrimination claim is identical to that before the NLRB,

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[11] It is clear also that jurisdiction is concurrent between the EEOC and NLRB over claims that may fall within each statute. See Beverly, 437 F.2d at 1140, n.22.

Doulamis is still entitled to pursue her claim under Title VII before the EEOC. See Alexander, 415 U.S. at 47-48. Since the conduct prohibited by Title VII is nearly the same as that proscribed by chapter 151B and Congress intended Title VII to provide a concurrent remedy to the NLRA in areas of overlap, it would be difficult to impute to Congress any hostility to the enforcement of chapter 151B with respect to areas of potential overlap with the NLRA.

There is, however, no need to rely on such a general proposition in this case because Congress has affirmatively stated in the language and through the structure of Title VII itself that state anti-discrimination laws may provide a remedy that overlaps with the NLRA. Not only did Congress affirmatively preserve the operation of state anti-discrimination laws in Title VII, see 42 U.S.C.A. ¶ 2000e-7, but it made the state anti-discrimination statutes an integral component of the Title VII enforcement structure. See 42 U.S.C.A. ¶ 2000e-5(c) ("section 706(c)"). Section 706(c) of Title VII explicitly provides that in states like

Massachusetts (which have anti-discrimination statutes and an agency charged with enforcing the state statute) jurisdiction in the state administrative agency is exclusive for the first 60 days after a claim is filed. See 42 U.S.C.A. ¶ 2000e-5(c).

The importance of state anti-discrimination statutes in the enforcement scheme of Title VII was of major concern to Congress in enacting Title VII. Isaac v. Harvard University, 769 F.2d 817, 822 (1st Cir. 1985) ("The issue reflected in section 706(c), the relationship between federal and state remedies for employment discrimination, received much attention throughout the legislative process."). The legislative history shows that section 706(c) of Title VII was enacted "to keep primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level.'" Id. (quoting 110 Cong. Rec. 13087 (1964) (comments of Senator Dirksen)).[12] It was critical to the passage of Title VII that the

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[12] The EEOC has recognized the importance of allowing state anti-discrimination statutes to operate in order to effectuate Congress' purposes for Title VII. See, e.g., 29 C.F.R. ¶ 1601.13(a)(3)(I) (1995) ("In order to give

federal government initially defer to the states in matters involving discrimination. Moreover, Congress did not devise this enforcement structure simply for administrative convenience (i.e., to avoid duplication of effort). As this court has previously said, section 706(c) "was first, and foremost, a statute of deference." Isaac, 769 F.2d at 824, see also id. at 824 n.9 (citing Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) and stating that "[t]he Court's implicit message appears to be that deference, and not duplication, was at the heart of section 706(c)").[13] And Congress clearly had

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full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice ["FEP"] agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII or the ADA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission.").

[13] Under the EEOC's regulations the MCAD is not only a designated FEP agency, see 29 C.F.R. ¶ 1601.74 (1995), but it is a certified designated FEP agency, see ¶ 1601.80 (1995), to which the EEOC gives a higher level of deference than it otherwise does to designated FEPs. See 29 C.F.R. ¶ 1601.75(a) (1995).

the NLRA in mind when it mandated this principle of deference to the state anti-discrimination statutes. See Alexander, 415 U.S. at 48 n.9 (quoting 110 Cong. Rec. 7207 (1964) (where Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum specifically mentioning the relationship between Title VII and the NLRA)).

If Congress believed that state anti-discrimination statutes could not regulate coextensively with Title VII, then perhaps preemption would be appropriate. But that is not the case. Nothing in Title VII says that state anti-discrimination statutes cannot apply coextensively with the Title VII. More significantly, there clearly is nothing that says that the exclusive jurisdiction of state administrative agencies under section 706(c) is limited to cases under Title VII that do not overlap with the NLRA.

It is possible to draw at least two conclusions relevant to congressional intent from Title VII. First, Congress affirmatively intended that state anti-discrimination statutes would operate to regulate conduct covered by Title VII to the same extent as Title

VII itself and, thus, in areas that might also be covered by the NLRA. Second, Congress could not have intended to eliminate the operation of state anti-discrimination statutes over claims covered by Title VII because that would actively impair the operation of Title VII and frustrate the enforcement scheme Congress envisioned. Not even ERISA preemption, which is arguable much broader than Garmon preemption, see Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985) (distinguishing ERISA preemption from NLRA preemption by stating that ERISA preemption is statutorily mandated), allows preemption where it would impair the operation of Title VII. See Shaw v. Delta Airlines, Inc., 463 U.S. 85, 102 (1983) (where ERISA preemption of a state anti-discrimination statute would impair the operation of Title VII, there is no preemption). The reasonable conclusion is that Congress intended to allow state anti-discrimination statutes to overlap with the NLRA.

The Supreme Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), reinforces this

conclusion. In Alexander the Court was called upon to determine the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements in the resolution and enforcement of an individual's rights under Title VII. There an employee had a claim for discrimination that was clearly covered by a collective bargaining agreement.[14] At issue was whether the employee's remedies provided in the collective bargaining agreement (and subject to arbitration) precluded a suit in federal court based on Title VII.[15] The Court unanimously held that it did not, saying:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. ¶ 2000e et seq., Congress indicated that it considered the policy against discrimination to be of the "highest

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[14] The right to bargain collectively is, of course, an NLRA conferred right. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 n.8 (1985).

[15] In Alexander, as here, there had been no waiver of statutory rights. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

> priority." Newman v. Piggie Park Enterprises, [390 U.S. 400, 402 (1968)]. Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U.S.C. ¶ 2000e-5(b) (1970 ed., Supp. II) (EEOC); 42 U.S.C. ¶ 2000e-5(c) (1970 ed., Supp. II) (state and local agencies); 42 U.S.C. ¶ 2000e-5(f) (1970 ed., Supp. II) (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

Alexander, 415 U.S. at 47-48 (emphasis supplied; footnotes omitted);[16] see also Brown v. Hotel and Restaurant Employees and

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[16] The Court has applied a similar analysis in analogous situations. See Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 412 (1988) (suggesting that " ¶ 301 does not preempt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge." (citation omitted)); Colorado Anti-Discrimination Commission v. Continental Air Lines Inc., 372 U.S. 714, 724 (1963) (rejecting a claim that a state anti-discrimination law was preempted by the Railway Labor Act, which is similar to the National Labor Relations Act).

Bartenders Intern. Union, Local 54, 468 U.S. 491 (1984).[17]

National labor relations policy does not begin and end with the NLRA. Title VII is as much a part of the network of labor relations law as is the NLRA. Where Congress has so clearly indicated that state anti-discrimination laws are to operate hand in

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[17] At issue in Brown was whether ¶¶ 86 and 93 of the New Jersey Casino Control Act (which set qualifications for union officials) were preempted by ¶ 7 of the NLRA. It was argued that the New Jersey statute was preempted because it interfered with the right protected under ¶ 7 of employees to choose their union officials. The Supreme Court held that ¶ 7 did not completely preempt ¶¶ 86 and 93 of the New Jersey statute. In the Court's view, Congress had, through the passage of the Labor-Management Reporting and Disclosure Act ("LMRDA"), disclaimed any intent to pre-empt all state regulation which touched upon the specific right of employees to decide which individuals will serve as officials of their bargaining representatives. The LMRDA had imposed, in ¶ 504(a), federal qualification standards for union representatives. Because the LMRDA affirmatively preserved the operation of state laws in ¶ 603 and made ¶ 504(a) itself dependent in part on state laws for its enforcement, the Court held that state laws could impose their own similar qualification standards on union officials. Id. at 509.

Brown is highly instructive on the type of approach required for this case. In Brown, Court focussed on the indicia of congressional intent that could be found not just in the NLRA, but also in a parallel federal statute. The parallel federal statute there specifically reserved a place for state regulation over the conduct coming within its scope. While the LMRDA does not bear on this case, Title VII does, and Title VII makes clear that Congress intended federal and state regulation of discrimination to overlap. The differences between Brown and this case do not affect the central instruction of Brown: that a federal court must defer to congressional intent in making any preemption analysis, even one involving the NLRA and even if it is expressed in another federal statute.

hand with Title VII (indeed, for a limited period to the exclusion of Title VII) it is difficult to conclude Congress intended preemption under the circumstances here. In the words of Garmon, preemption should not be found absent "compelling congressional direction." Garmon, 359 U.S. at 244. Here, all the congressional direction is to the effect that state anti-discrimination statutes may supplement federal laws, including federal labor laws, and Garmon preemption is therefore inappropriate.

II.

Having stated my disagreement with the view that Doulamis' sex discrimination claim is preempted by the NLRA, I consider what perhaps may be a conceptually prior issue, the issue of abstention. By seeking an injunction against the state proceedings, Chaulk has effectively asked the federal court to enjoin the state courts from deciding the Garmon issue. Thus, the potentially dispositive question, apart from whether Garmon preemption is appropriate, is whether this federal court should bar the state fair employment agency from hearing this claim and so

bar Massachusetts state courts from deciding the Garmon issue themselves, or to the contrary, abstain from decision and allow the state agency and courts to proceed. As with the preemption issue, this issue is difficult, but on balance I would hold here under Younger v. Harris, 401 U.S. 37 (1971), and its progeny, that abstention is appropriate.

Younger prevents interference with pending state administrative proceedings if they are of a judicial nature, implicate an important state interest, and provide federal plaintiff an adequate opportunity to litigate his constitutional claim. Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1985). Although Chaulk claims that Younger abstention is a principle of "discretionary deference," the Supreme Court has stated that where a case falls within the Younger parameters, a district court has no discretion to provide injunctive relief and must abstain. See Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 n.22 (1976) ("Where a case is properly within [the Younger] category of cases, there is no

discretion to grant injunctive relief."); see also Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635, 639 (6th Cir. 1990) ("[U]nlike other forms of abstention, when a case is properly within the Younger category of cases, there is no discretion on the part of the federal court to grant injunctive relief."); Senaca-Cayuga Tribe v. State ex rel. Thompson, 874 F.2d 709, 711 (10th Cir. 1989) (Younger abstention not discretionary once conditions are met, absent extraordinary circumstances that render a state court unable to give litigants a full and fair hearing on their federal claims).[18]

There is no question that the MCAD proceedings were ongoing at the tine Chaulk's district court complaint was filed, see Bettencourt v. Board of Registration in Medicine, 904 F.2d 772, 777 (1st Cir. 1990) (in determining interference "the proper point of reference is the date plaintiff filed his federal complaint"), and

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[18] The majority quarrels with this proposition stating that the Colorado River case was discussing criminal cases. Colorado River, however, was discussing Younger abstention and Younger clearly applies to non-criminal state administrative proceedings. See Dayton Christian Schools, 477 U.S. at 627 & n.2.

that the proceedings are judicial in nature. See Dayton Christian Schools, 477 U.S. at 629 (finding Ohio Civil Rights Commission proceedings sufficiently judicial in nature). The significant questions here are whether the state interest in deciding sex discrimination claims is important and whether there will be an adequate opportunity for Chaulk to raise the Garmon preemption question in the Massachusetts state forum.

The Supreme Court has said that remedying sex discrimination is a sufficiently important state interest to trigger Younger. See Dayton Christian Schools, 477 U.S. at 628 ("We have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of [Younger and its progeny]."). Although Chaulk has suggested that there can be no significant state interest in this case because it is preempted, such an argument, I believe, is most likely foreclosed by New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 365 (1989) ("NOPSI"). In NOPSI the Court said that in determining the

importance of the state interest courts should "not look narrowly to its interest in the outcome of the particular case -- which could arguably be offset by a substantial federal interest in the opposite outcome." Id. Courts rather must look to the "importance of the generic proceedings to the State." Id. (citing Dayton Christian Schools). As Dayton Christian Schools made explicit, Massachusetts has a legitimate and important state interest in preventing sex discrimination. Thus the important state interest prong of Younger is satisfied in this case.

Where there is an important state interest, the Supreme Court has noted that a federal court should abstain unless state law clearly bars the interposition of the federal plaintiff's constitutional claim. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). Here, we have no reason to doubt that the Massachusetts state courts will provide Chaulk with a full and fair opportunity to raise the Garmon preemption question. Chaulk raised the preemption argument before the MCAD and will have a further opportunity to pursue it before the Massachusetts

appellate courts. Dayton Christian Schools, 477 U.S. at 629 ("[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding.") (citation omitted).

If federal law barred the Massachusetts state courts form deciding the Garmon preemption question, then the "adequate opportunity" prong would not be met. Indeed such a proposition appears to be at the heart of Chaulk's argument. Chaulk argues: "[W]here conduct is arguably protected or prohibited by the NLRA, jurisdiction over that conduct is preempted in the labor context and is exclusively federal. The determination of whether the case arguably falls within the preempted field is also to be made by the federal courts, not State courts or State tribunals" (emphasis supplied).

But that proposition is untenable and inconsistent with the Supreme Court's case law. Although state courts may be deprived of jurisdiction to decide a case once it is preempted under Garmon, they are not deprived of jurisdiction to decide whether a case is so

preempted. State courts have concurrent jurisdiction to decide federal preemption issues. See Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court."); see also Turnbow v. Pacific Mut. Life Ins. Co., 934 F.2d 1100, 1103 (9th Cir. 1991) (no jurisdictional bar to state court deciding ERISA preemption question); Sun Refining & Marketing Co. v. Brennan, 921 F.2d 635, 641 (6th Cir. 1990) (discussing possibility of Younger abstention question in situation involving state action that was arguably subject to the exclusive jurisdiction of Occupational Safety and Health Administration ("OSHA") and stating, "it is undisputed the concurrent jurisdiction exists in the Ohio state courts to decide the federal pre-emption issue").

Garmon preemption is no exception to this principle. Cf. International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 393 (1985) ("when a claim of Garmon preemption is raised [in state court], it must be considered and resolved by the state

court" (emphasis supplied)). Because the Massachusetts state courts have concurrent jurisdiction to decide the Garmon preemption issue, Chaulk will have an adequate opportunity to raise its Garmon preemption claim in the Massachusetts courts, and thus the "adequate opportunity" prong of Younger is also met here.

Perhaps recognizing that Younger applies to this case, Chaulk has argued that preemption cases should be treated differently than typical Younger abstention cases. It says that "[t]he real issue in this case in whether a doctrine of comity should be applied in a Garmon preemption case." It argues that treating this case under Younger "confuses two federal concepts which are rooted in very different soil"; and that while Younger "is predicated upon discretionary deference by the federal government to fundamental State interests," preemption "is mandatory and arises under the Constitution, specifically, the Supremacy Clause." According to Chaulk "[t]o elevate the equitable doctrine of abstention over the Constitutional doctrine of preemption would

truly be to elevate form over substance."

Whatever the merits of Chaulk's argument in theory, the Supreme Court has apparently rejected it. In NOPSI the Court said that preemption issues do not involve a greater federal interest than other constitutional challenges:

> There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action. Yet it is clear that the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction . . . . [P]reemption-based challenges merit a similar focus . . . .

Id. at 365. Thus, courts are to analyze Younger abstention cases involving preemption claims no differently than any other Younger abstention case, see Sun Refining, 921 F.2d at 639, and even a substantial claim of federal preemption is not sufficient to

overcome Younger. See NOPSI, 491 U.S. at 365-66.[19]

The exception to Younger that provides that abstention may be improper where the plaintiff might suffer irreparable injury absent equitable relief is not applicable here. A sufficient risk of irreparable injury may exist where the challenged state statute is "flagrantly and patently violative of express constitutional prohibitions. . . ." Younger, 401 U.S. at 53-54. But chapter 151B is hardly flagrantly unconstitutional and, given the complexities of the preemption question, it is difficult to describe the MCAD's actions as flagrantly or patently violative of the Garmon

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[19] A distinction exists between preemption involving a choice of forum and preemption involving a choice of law. Cf. Violette v. Smith & Nephew Dyonics, Inc., 62 F.3d 8, 11 (1st Cir. 1995) (choice of forum preemption is jurisdictional and cannot be waived, while choice of law is not and may be waived). The argument might be made that because Garmon involves choice of forum preemption there is a greater federal interest to protect than in a case involving choice of law and that, accordingly, abstention here might not be appropriate here even if abstention for choice of law preemption would be. NOPSI, however, says that the federal interest is not to be weighed against the state interest. See Sun Refining, 921 F.2d at 641. Thus even if the federal interest in Garmon preemption is weightier than in choice of law preemption cases, that consideration does not affect the Younger inquiry; abstention is appropriate as long as an important state interest is identified and the other requirements are met. See Middlesex County, 457 U.S. at 431-32; Sun Refining, 921 F.2d at 641.

preemption principle.

Further, although the Supreme Court in NOPSI left open the question of whether a "facially conclusive" claim for preemption might fall within the exception to Younger, see NOPSI, 491 U.S. at 367, the preemption claim here is not facially conclusive. For Chaulk's preemption claim to be facially conclusive the federal courts must be able to determine the state action is preempted "without further factual inquiry." Id. Chaulk cannot meet this standard.

The MCAD has not sought directly to regulate unfair labor practices nor has it questioned the authority of the NLRB to adjudicate the unfair labor practices claim. Cf. NOPSI, 491 U.S. at 367. It has in fact said that "the issue of union interference is properly left to the provinces of the NLRB." Neither has it challenged the non-admission settlement agreement that Chaulk has entered, nor does it appear that the MCAD action will

undermine that agreement.[20] Even if there were reason to doubt whether Doulamis has a bona fide claim for sex discrimination or whether the MCAD should adjudicate the dispute, it would be impossible "conclusively [to] say [the MCAD] is wrong without further factual inquiry -- and what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination." NOPSI, 491 U.S. at 367.[21]

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[20] There is nothing in the record to show that the NLRB even considered Doulamis' claims for sex discrimination in the context of the unfair labor practice charges. Moreover, the settlement agreement itself "does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable" (emphasis supplied).

[21] There may be situations in which the preemption claim could be facially conclusive and abstention would not be appropriate. For example, this case would be viewed quite differently had Doulamis alleged before the MCAD that the discrimination Chaulk engaged in was simply based on her potential affiliation in the union, as opposed to her gender. In such a case, the question whether the claim was within the exclusive jurisdiction of the NLRA would not turn on deciding whether her claim was a case of artful pleading. No more facts would need be determined and under such circumstances abstention would probably not be appropriate. Moreover, were the MCAD to assert jurisdiction under such circumstances, there would be a good argument that the MCAD was behaving in flagrant disregard of the Garmon preemption principle.

Finally, the fact that the union filed a complaint with the NLRB before Doulamis filed her complaint before the MCAD does not resolve the matter.[22] To begin with, Chaulk never raised such a theory as a basis to prevent abstention. Its initial brief, its reply brief, and the supplemental letter memorandum requested by the panel at oral argument are devoid of any argument that abstention is inappropriate because the NLRB proceeding was pending at the time of the MCAD complaint. It is therefore waived. See Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 36 (1st Cir. 1994). Moreover, there does not appear to be case law squarely supporting such a theory. Indeed, such a theory of abstention appears to be at odds with the treatment of the issue in at least one other circuit. See Sun Refining, 921 F.2d at 639-42 (abstention was appropriate despite claim that the state law action violated the exclusive jurisdiction of OSHA and despite fact that

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[22] Although Doulamis' complaint before the MCAD was filed on December 1, 1993 the proceedings before the MCAD began on November 23, 1993 when Doulamis underwent her intake interview.

OSHA action had been pending and concluded months before the state action was brought). As a matter of policy, the existence of a NLRB action at the time a parallel state proceeding is filed should not control the matter here. The NLRB, if it so chose, could have sought an injunction against the state proceedings if it thought the state proceedings conflicted with its exclusive jurisdiction. NLRB v. Nash-Finch Co., 404 U.S. 138, 142-44 (1971).[23] The fact that the NLRB did not so move speaks volumes.

I respectfully dissent.

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[23] Even the cases cited for the proposition that a federal court may enjoin a state court's intrusion into a federal agency's exclusive jurisdiction do not stand for such a broad proposition. In the only labor case cited, American Federation of Labor v. Watson, 327 U.S. 582 (1946), the court specifically said that for such an injunction to issue there must be an immediate threat of irreparable injury, such as an "imminent threat to an entire system of collective bargaining." Id. at 595. No comparable threat exists here. In fact, in Watson the Court explicitly said that the threat of multiple prosecution under the state law would not be sufficient to justify an injunction. See id. The Court also abstained under the doctrine of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). See id. at 599.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 95-1249

CHAULK SERVICES, INC.

Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, et al.,

Defendants-Appellees.

BEFORE
TORRUELLA, Chief Judge,
SELYA, CYR, BOUDIN, STAHL,
and LYNCH, Circuit Judges,
and Casellas*, District Judge.

ORDER OF THE COURT

Entered: January 18, 1996

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Janice M. O'Neil
Janice O'Neil, Acting Clerk

[cc: Messrs. Murphy, Menard, Lee, Ms. McClure]

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*of the District of Puerto Rico, sitting by designation.

29 U.S.C. § 158 (1994)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (I) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held has provided in section 159(e) of this title within one year preceding the effective date of

such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given

testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents-

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provision of section 159(a) of this title; (4)(I) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or

restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be

construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C)forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful

a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment

to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be

performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has

been conducted, or

(c) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such

picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) **Expression of views without threat of reprisal or force or promise of benefit**

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) **Obligation to bargain collectively**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the

representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of

this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in the subsection (g) of this section, shall lose his status an a employee of the employer engaged in the particular labor

dispute, for the purposes of the sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(c) After notice is given to the Federal Mediation

and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable

and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work; *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such

employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of

bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Mass. G.L. c. 151B § 3 (1994 ed.)

Function, powers and duties of commission.

Section 3. The commission shall have the following functions, powers and duties:

1. To establish and maintain its principal office in the city of Boston and such other offices within the commonwealth as it may deem necessary.

2. To meet and function at any place within the commonwealth.

3. To appoint such attorneys, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

4. To obtain upon request and utilize the services of all executive departments and agencies.

5. To adopt, promulgate, amend, and rescind rules and regulations suitable to carry our the provisions of this chapter, and the policies and practice of the commission in connection

therewith.

6. To receive, investigate and pass upon complaints of unlawful practices, as hereinafter defined, alleging discrimination because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person. The term "sexual orientation" shall mean having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality. The commission through its chairman may appoint a single commissioner to hold public hearings, as hereinafter provided, and to otherwise act on its behalf in connection therewith; provided, however, that a person aggrieved by the decision of said single commissioner may, within the testimony of any person under oath, file an appeal for rehearing or review by the commission.

7. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners.

No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

8. To create such local or regional advisory boards as in its judgment will aid in effectuating the purposes of this chapter. Each advisory board shall consist of not less than eleven members. To the extent reasonably possible the members of each board shall include representatives of owners and brokers of residential property; major lending and credit institutions; major private employers; a local personnel or civil service administrator; local post-secondary educational institutions; local labor organizations; minority racial, ethnic and linguistic groups; women; elderly and handicapped persons; and recipients of public assistance. The members of such advisory boards shall serve without pay but shall be reimbursed for their actual and necessary expenses. The commission may provide technical and clerical assistance to the advisory boards.

9. To issue such publication and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of the race, color, religious creed, national origin, sex, sexual orientation,

which shall not include persons whose sexual orientation involves minor children as the sex object, age or ancestry.

10. To render each year to the governor and to the general court a full written report of its activities and of its recommendations.

11. To adopt and official seal.

12. To give its opinion upon questions submitted to it by any employer, employment agency or labor organization concerning whether any existing or proposed requirement for employment or for membership in such organization is a bona fide occupational qualification. Copies of such opinions shall be maintained in the files of the commission at its office and shall be available during regular business hours for public inspection. An opinion, or request therefor, given under this subsection shall not operate to interfere with any proceeding under section five.

13. To adopt, promulgate, amend, and rescind rules and regulations, jointly with the attorney general, for the purpose of carrying out the provisions of subsection 13 of section four,

including special regulations applicable to neighborhoods or areas found by the commission, with the concurrence of the attorney general, to be threatened with deterioration or instability associated with the entry or prospective entry into such neighborhoods or areas of a person or persons of a particular age, race, color, religion, national or ethnic origin, or economic level.

14. To accept gifts, contributions or bequests of funds or other aid from any source, whether public or private and from federal, state or other governmental bodies for the purpose of furthering the commissions mandate; provided, however, that all amounts received pursuant to this paragraph shall be deposited with the treasurer and made available to the commission for expenditure for any purposes authorized by this chapter.

Mass. G.L. c. 151B § 4 (1994 ed.)

Unlawful practices

Section 4. It shall be unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any

particular day or days or any portion thereof as a Sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his Sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required to his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence form work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. "Reasonable Accommodation", as used in this subsection shall mean such accommodation to an employee's or prospective

employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or

his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, or ancestry of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in

any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age or ancestry, or the handicap of a qualified handicapped person or any intent to make such any limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, sexual orientation, age or ancestry or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, or ancestry of the person to be bonded.

3B. For an person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, ancestry, age or handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by the residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age

group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwelling, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent

or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or

privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons fifty-five or over or sixty-two or over, on one parcel or on contiguous parcels of land, totaling at

least five acres in size. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but it not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii)

all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such

accommodations or land because of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or

oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, or the other occupancy unit of which is occupied by the owner as his residence. The word "age" as used in this subsection shall not apply to person who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons fifty-five or over or sixty-two or over, on one parcel or on contiguous parcels of land, totaling at least five acres in size. For

the purpose of this subsection, housing intended for occupancy by person fifty-five or over sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expenses of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person

will materially alter the marketability of the housing, condition permission for a modification on the tenant agreement agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person's need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or

fewer vertical steps, widening a doorway, and installing grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extend to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person

having the right of ownership to recover the cost of the accommodation or modification through a tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirement of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing

under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if is to be occupied by a person who is in need of wheelchair accessability.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation which shall not include persons whose sexual

orientation involves minor children as the sex object, national origin, ancestry, children, marital status, public assistance recipientcy, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, handicap or marital status in the terms, conditions or privileges of

the sale, rental or lease of any such commercial space or in the furnishing of facilities or services, in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word "age" as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other

matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which nc conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for

employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or renting accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rent supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistant or housing subsidy program

11. For the owner, sublessee, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other

covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other

accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for who in the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, by himself or his agent, to refuse to restore certain female employees to employment following their absence by reason of a maternity leave taken in accordance with section one hundred and five D of chapter one hundred and forty-nine or to otherwise fail to comply with the provisions of said section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to any female employee for the fiscal year during which she is absent due to a maternity leave taken in accordance with said section or to impose any other penalty as a result of a maternity leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained sixty-two or over.

13. For any person to directly or indirectly induce,

attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communications with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, national or ethnic origin, or economic level or a handicapped person, or a person having a

child; or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area,

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which

consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court

may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be

made to the physical or mental limitations of the person would impose an undue hardship to the employer's business.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:-

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an

applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall

excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policy making position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was

formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations, or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it

shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the department of employment and training in the executive office of

economic affairs, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commissioner may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be

prescribed by federal rule or regulation so long as not such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of Civil Rights Act of 1964, from time to time amended. This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organization which have more members on each such working day during such period.

Period Ending.	Minimum Employees or Members.
June 30, 1965	100
June 30, 1966	75
June 30, 1967	50
June 30, 1968 and thereafter	25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant

preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons who sexual orientation involves minor children as the sex object, age or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership of classified by any labor organization or employed in, any apprenticeship or other training program, and the total number of percentage of persons of such race, color, religious creed, national origin, sex, sexual orientation whose sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age or ancestry in the commonwealth or in any community, section or other area therein, or in the available

work force in the commonwealth or in any of its political subdivisions.

Mass. G.L. c. 151B, § 5 (1994 ed.)

Complaint; procedure; limitations; bar to proceeding; award of damages.

Section 5. Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sigh and file such complaint. The commission, whenever it has reason to believe that any person has been or is

engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten o refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probably cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probably

cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A.

If such commissioner shall determine after such investigation or preliminary hearing that probably cause exists for crediting the allegations of a complaint relative to a housing practice, the commission shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If the complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probably cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from

subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize, and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probably cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial

determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the

commission or such other place as may be designated by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees retaining or enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commission who shall have previously made the investigation and caused the

notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probably cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings

under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process of within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating

to such property which has been the subject of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the

evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with our without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the

commission shall find that a respondent has not engaged in such unlawful practice of violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and caused to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a

judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear

witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to a housing practice it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed ten thousand dollars if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(b) in an amount not to exceed twenty-five thousand dollars if the respondent has been adjudged to have committed one other discriminatory housing practice during the five year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed fifty thousand dollars if

the respondent has been adjudged to have committed two or more discriminatory housing practices during the seven year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory housing practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

29 C.F.R. §1601.13 (1995)

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no FEP agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set

forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of Section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII or the ADA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as permitted by law and is practicable.

(ii) Section 706(a) of title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the

effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a Sate or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A FEP agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate FEP agency.

(4) The following procedures shall be followed with respect to charges which arise in jurisdictions having a FEP agency with subject matter jurisdiction over the charges:

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8 which may constitute a charge cognizable under title VII of the ADA, and

where the FEP agency has not waived its right to the period of exclusive processing with respect to that documents, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the original document, shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or, where the FEP agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the FEP agency pursuant to the provisions of section 706(c) of title VII.

(ii) Such charges are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the FEP agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such

filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the FEP agency has waived its right to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(4)(I) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Where the FEP agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the FEP agency terminated its proceedings of the FEP agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) *Initial presentation of a charge to a FEP agency.* (1) When a charge is initially presented to a FEP agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiation of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by registered mail or was otherwise received by the FEP agency, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a FEP agency but the charging party does not request that the charge be presented to the Commission, the charging party may present the charge to the Commission as follows:

(i) If a FEP agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be

processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) If the FEP agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the FEP agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier.

(iii) If the FEP agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiation of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by certified mail or was otherwise received by the FEP agency, or upon the termination of the FEP agency proceedings, or upon wavier of the FEP agency's right to exclusively process the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days

from the date of the alleged violation.

(c) *Agreements with Fair Employment Practice agencies.* Pursuant to section 705(g)(1) and section 706(b) of title VII, the Commission shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide or processing of certain charges by the Commission, rather than by the FEP agency during the period specified in section 706(c) and section 706(d) of title VII.

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of title VII.

(e) *Commissioner charges.* A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The

Commission will notify a FEP agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the FEP agency. The FEP agency will be entitled to process the charge exclusively for a period of not less than 60 days if the FEP agency makes a written request to the Commission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law.

Supreme Court, U.S.
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No. 95-1679

In the Supreme Court of the United States

OCTOBER TERM, 1995

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
PETITIONER,

v.

CHAULK SERVICES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF INTERESTED PARTIES

Respondent in this action is Chaulk Services, Inc. which, as of December 1, 1995 has been d/b/a American Medical Response Massachusetts, Inc., a Massachusetts corporation.

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In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1679

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
PETITIONER,

v.

CHAULK SERVICES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests this Court deny the Petition for a Writ of Certiorari which seeks review of a decision of the United States Court of Appeals for the First Circuit entered on November 27, 1995. A petition for rehearing *en banc* was denied on January 18, 1996.

STATEMENT OF JURISDICTION

Jurisdiction to review the decision of the Court of Appeals is properly invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

This case involves an appeal from a decision of the United States Court of Appeals for the First Circuit.[1]

On December 1, 1993, Petrina Doulamis/Sullivan (Doulamis) filed a Complaint with the Massachusetts Commission Against Discrimination (Commission) alleging unlawful discrimination against her in violation of Mass. Gen. L. ch. 151B, §4 and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000e—2000e-17 (West 1994 & Supp. 1995) Pet.App.11A. In that Complaint she stated, *inter alia*, "(o)n November 10, 1993, I was harassed about my union activity. I believe the reason is because I am a female." Pet.App.42A. After alleging certain discriminatory activities by Chaulk on November 10, 15, and 29, 1993, she concluded, "I believe that I am being single (*sic*) out by the Respondent because I am a female. There are numerous other male organizers who are not being harassed." Pet.App.43A. On or about December 2, 1993, Eric Burgess, a co-worker of Doulamis and fellow union organizer, was suspended by Chaulk. Pet.App.10A.

Contemporaneously, on December 9, 1993, the International Association of EMTs & Paramedics, affiliated with NAGE (AFL-CIO), (Union) filed a charge with the National Labor Relations Board (NLRB) alleging that Chaulk had discriminated against Doulamis because of her union activity. Pet.App.9A.

Thereafter, on February 3, 1994, the NLRB issued a Complaint against Chaulk based on the December 9 filing by the Union. In that Complaint, the NLRB specifically alleged that Chaulk had violated §§8(a)(1) and (3) of the National Labor Relations Act (NLRA) and had interfered with, restrained and

---

[1] All "Pet.App." references are to the Appendix. All "Pet." references are to the Petition.

coerced employees in the exercise of their rights guaranteed in §7 of the Act.[2]

The Complaint, alleged that, about November 29, 1993, Chaulk issued a written warning to its employee, Petrina Doulamis, and about December 7, 1993, Chaulk issued a letter to its employee, Petrina Doulamis, threatening her with discipline if she attended any future 401(K) meetings held by Chaulk with its employees. Pet.App.9A-10A. The Complaint went on to assert that Chaulk engaged in the alleged discriminatory conduct because it mistakenly believed that employees were engaged in misconduct arising out of union or other protected concerted activity. Pet.App.10A.

Chaulk filed its Answer in that case on November 16, 1994, denying each and every allegation that it had violated the §7 rights of Doulamis under the NLRA, as well as all other allegations.

Thereafter, on February 18, 1994, Chaulk moved that the Commission dismiss the MCAD Complaint because it was preempted by federal labor law. Pet.App.11A.

On May 13, 1994, the Commission issued an Order denying Chaulk's Motion To Dismiss. Pet.App.11A. In that Order, the Commission stated, as the essential basis for denial, that it need not resolve the merits of the underlying labor dispute in order to resolve the Complaint of alleged discrimination. Pet.App.12A.

Respondent filed the present action in the United States District Court for the District Of Massachusetts on December 8,

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[2] Section 7 of the National Labor Relations Act states, *inter alia*, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." "Section 8(a)(1) of the Act also makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in §7".

Section 8(a)(3) of the Act also makes it an unfair labor practice, *inter alia*, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

1994, seeking declaratory judgment as well as an injunction barring the continued prosecution of Doulamis' complaint before the MCAD. Pet.App.12A.

The Massachusetts Commission Against Discrimination filed a Motion To Dismiss, which was granted on February 7, 1994. Pet.App.1A. The decision was appealed by Chaulk to the Court of Appeals for the First Circuit. Pet.App.7A.

On March 22, 1995, Chaulk entered into a binding, non-admission settlement agreement with the National Labor Relations Board resolving all of the complaints of NLRA violations, including those in the Doulamis case. Pet.App.10A.

On November 27, 1995, the decision of the Federal District Court to abstain was reversed by the First Circuit, which held that the MCAD Complaint was preempted by the NLRB proceedings and the abstention doctrine did not apply. Pet.App.7A.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

1. In the Complaint filed with the MCAD, Doulamis alleges that there were "numerous other male organizers who (were) not being harassed." However, the Petition fails to indicate that Eric Burgess, a male co-worker of Doulamis', who was also involved in the union organizing effort, was a co-author of the pro-union letter submitted to Chaulk management, and was suspended from Chaulk on December 3, 1993.

As part of its non-admission settlement agreement with the NLRB, Chaulk compensated Burgess for the time that he was suspended from Chaulk.

2. The Petition also indicates that the majority of the First Circuit held that "the NLRA pre-empts state anti-discrimination statutes." Pet.28. However, this assertion is misleading. The holding of the court below was that this case involved labor issues exclusively within the jurisdiction of the NLRB and that, regardless of how artfully Doulamis pled her claim to the MCAD, it was preempted by the NLRB pro-

ceedings. At no point in its opinion did the court hold that the NLRA preempts state anti-discrimination statutes.

3. Finally, the Petitioner contends that the majority decision conflicts with a decision rendered by the Massachusetts Supreme Judicial Court, namely *Mass. Electric* v. *Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192 (1978). There, the SJC held that "(d)iscrimination in employment. . . is generally considered to be a 'peripheral concern' of the National Labor Relations Act, and thus, State anti-discrimination statutes are not pre-empted by federal labor law." *Id.* at 1202. Petitioner erroneously contends that the decision of the First Circuit on appeal conflicts with this holding. However, as stated, *supra*, this assertion is a misstatement of the holding of the majority decision below.

ARGUMENT

Petitioner has failed to state any compelling reason upon which the Petition for a Writ of Certiorari should be granted. As grounds for the Petition, Petitioner puts forth two arguments.

First, Petitioner contends the decision of the First Circuit presents an important question that this Court left open in its decision in *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) (hereinafter *NOPSI*). Petitioner argues that the question of whether a facially conclusive preemption claim overrides *Younger* abstention is an issue ripe for consideration on the facts of this case.

Although the Circuit Court mentioned the *NOPSI* case in its discussion of abstention, its rationale for finding that abstention was improper had nothing to do with whether or not the claim presented was one of "facially conclusive" preemption. Rather, the court's rationale for finding that the claim before the Massachusetts Commission Against Discrimination, (hereinafter MCAD), was preempted by exclusive jurisdiction of the NLRB was that, on all the evidence, "under the *Garmon* doctrine" it was "*readily apparent* that the Com-

mission (wa)s acting beyond its jurisdictional authority." Pet.App.36A. (emphasis supplied). Therefore, Petitioner's reliance in this Petition on an issue of "facially conclusive" preemption has no bearing on the decision in this case and does not present a compelling reason for granting the Petition.[3]

Moreover, the *NOPSI* case is irrelevant to the issues presented in the case at bar and any determination as to the Court's holding in that case is misplaced. *NOPSI* was decided under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), *reh'g denied*, 320 U.S. 214 (1943) and not under the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), which is the abstention doctrine applicable to the facts of this case. *Burford* and *Younger* are two entirely separate doctrines and theories. Since *Burford* abstention is only required where a concurrent assertion of federal jurisdiction would disrupt a complex state regulatory scheme, not an issue in the present case, any reference to *Burford* abstention and the *NOPSI* case is inapposite.

The second argument put forth by the Petitioner, as compelling grounds for the granting of the Petition, is that the NLRA does not preempt state anti-discrimination laws. However, Respondent does not allege that it does, nor did the majority of the First Circuit so find. The facts of this case, the court held, did not present an anti-discrimination claim. The court did not find, as Petitioner argues, that the NLRB has jurisdiction over discrimination claims. Such an assertion is patently false. What the Court found was that, because the claim raised issues arising exclusively under the NLRA, the MCAD was without jurisdiction in the matter.

Further, the court reasoned, regardless of how diligently Doulamis recharacterizes her original claim before the

[3] It should also be noted, that the Petitioner relies for the first time before this court on the decision in *NOPSI* and has never raised the issues presented in that case in any previous proceeding. In fact, a review of Petitioner's brief filed with the First Circuit, clearly indicates no reliance on the *NOPSI* case, as not a single reference to that case was made on any page thereof.

MCAD, it is a labor relations claim and not a claim of gender discrimination. The court reasoned:

> (i)n the end, no recharacterization of this claim can obscure the fact that, at bottom, this is a classic example of an unfair labor practice claim of the kind traditionally handled in the first instance by the NLRB. Since the controversy before the MCAD and that resolved by the NLRB are the same in a fundamental respect, and the risk of interference with the Board's jurisdiction is obvious and substantial, we hold that the MCAD has no jurisdiction to entertain Doulamis' charge of sexual discrimination based on her employer's alleged interference with her union activities.

(Pet.App.24A-25A) (citing *Local 1926 International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 674 (1983)).

I. Under the Garmon doctrine, state action is preempted where the conduct in issue is arguably subject to the National Labor Relations Board.

In *Building Trades Council (San Diego)* v. *Garmon*, 359 U.S. 236 (1959), this Court held, "(w)hen an activity is arguably subject to §7 or §8 of the (National Labor Relations) Act, the states as well as federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted." *Id.* at 244. "The critical inquiry . . . is not whether the state is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented . . . is identical to . . . that which could have been . . . presented to the Labor Board." *Sears, Roebuck Co.* v. *San Diego Dist. Council of Carpenters*, 436 U.S. 180, 197-98 (1978). As the First Circuit held, the facts of this case fit squarely within the four corners of the *Garmon* doctrine.

Respondent does not allege that *all* claims involving *any*

type of labor relations issue is preempted by the jurisdiction of the NLRB. In fact, Respondent recognizes that there are two categories of exceptions to the *Garmon* doctrine. First, where conduct is only of "peripheral concern" to federal labor policy, an exception to Garmon preemption may exist. *Garmon*, 359 U.S. at 243. Similarly, state action is not preempted where the regulated conduct touches interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act." *Id.* However, as the First Circuit so aptly ruled, this case falls within neither of those exceptions.

If Petitioner's assertions were correct, any state with labor laws analogous to the NLRA would have jurisdiction and could oust the NLRB by asserting it. As the Tenth Circuit noted, even when a state is asserting an interest as strong as controlling organized crime, "where, as in this case, a state court is asked to decide issues of federal law in an area in which federal interests predominate, the state's interest in the litigation is in our view not important enough to warrant *Younger* abstention." *Seneca-Cayuba Tribe of Oklahoma* v. *State of Oklahoma*, 874 F.2d 709, 714 (10th Cir. 1989). Accord *California* v. *Cabazon Band of Mission Indians*, 480 U.S.202 (1987); *Sycuan Band of Mission Indians* v. *Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. denied*, __ U.S. __, 133 L.Ed.2d 203 (1995).

"When called to determine whether th(e) exceptions apply, courts must balance the state's interest in remedying the effects of the challenged conduct against both the interference with the NLRB's ability to adjudicate the controversy and the risk that the state will approve conduct the NLRB prohibits." Pet.App.16A, (citing *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498-499 (1983); *N.L.R.B.* v. *State of Ill. Dept. of Emp. Sec.*, 988 F.2d 735, 739 (7th Cir. 1993)). In determining whether or not these exceptions applied in the present case, the First Circuit focused on the conduct that manifested this controversy.

In viewing the facts, the First Circuit determined that the

essential claim was one within the exclusive jurisdiction of the NLRB, not merely because of the label affixed to it, but, rather, in light of the circumstances surrounding the claim. "It is the conduct being regulated, not the formal description of governing legal standards that is the proper focus of concern." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971). The First Circuit recognized that, if the conduct alleged to have taken place on the part of Chaulk, was "adequately established through competent evidence" it would constitute undue interference with Doulamis' rights under §7 of the NLRA and consequently a violation of §8(a)(1)of the Act." Pet.App.22A. Therefore, the conduct alleged was not only arguably subject to the National Labor Relations Act, but was "obviously prohibited under §8(a) of the Act." Pet.App.19A.

The crux of the claim at issue is whether or not Chaulk interfered with Doulamis' union organizing activities. Under §8(a)(1) of the Act, adjudication of such a practice is clearly within the exclusive authority of the NLRB. Mere insertion of the claim that one believes the action to be based on the fact she is female is not a sufficient basis for taking the case from the purview of the NLRB.

Congress has determined that labor relations are most effectively managed when adjudicated by one tribunal: the NLRB. There is no question, as the First Circuit correctly found *and* the interrogatories issued to Chaulk by the MCAD indicate (Pet.App.23A) that, if the Commission were to invoke its jurisdiction over this claim, it would be entering into the adjudication of an area of law specifically reserved for a federal body.

The Circuit Court's ruling that *Garmon* preemption applied was proper when viewed in light of the facts of this case. It is respectfully submitted that the findings of the panel should not be disturbed.

Clearly, the federal courts have the right to make a decision whether preemption exists and to determine whether or not a state agency, or a state court, has properly determined whether preemption exists in the final instance. *See Mitchell*

v. *Collagen Corp.*, 870 F.Supp. 885, 892 (D.C. Ind. 1994), *aff'd*, 67 F.3d 1268 (7th Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 32924 (7th Cir.1995), wherein the Court held:

> Preemption doctrine results from the duel between sovereigns inherent in a federal system. Whether a statute Congress enacts preempts state law depends on Congress' intent as expressed in the statute, not whether a state agrees that its laws are, or should be, preempted.

A. *The First Circuit did not hold that the NLRB preempts the MCAD in gender discrimination cases.*

The issue in this case is not, and never has been, whether the NLRA encompasses "discrimination based on gender," as petitioner alleges, but, rather, the issue is whether a complaint filed with the Commission, which alleges the Complainant was discriminated against in a union activity because she is a female, necessarily involves the Commission in an interpretation of labor law, and in the question of whether her conduct was "arguably protected" by the NLRA. The First Circuit correctly determined that it did.

There appears to be a fundamental misunderstanding in both the decision of the dissent and in the brief of Petitioner in that both make broad assertions about the rights of the Equal Employment Opportunity Commission (EEOC) and the states to prohibit discriminatory employment practices without focusing upon the appropriately narrow question of whether simply asserting gender is sufficient to take a case outside the ambit of the *Garmon* preemption doctrine. What both fail to take into account is that, when an assertion is made that there has been underlying interference with union activity, and this is the fundamental predicate for the legal action, the NLRB has primary jurisdiction.

B. *References To Title VII And The EEOC Are Also Inapposite In This Case*

What this case specifically does not involve is any conflict with the EEOC and with Title VII. Because the case involves a state statute, the Supremacy Clause of the U.S. Constitution is implicated. As this Court has recently held, "(b)ecause the NLRA's relationship with the State statute implicates the Supremacy Clause, and its relationship where the Federal statute does not, some courts hold that the analysis in the former situation should be stricter than in the latter." *Tamburello* v. *Comm-Tract Corp.*, 67 F.3d 973 n.2 (1st Cir. 1995). Thus, a case involving Title VII would not involve the issue of either *Younger* abstention or *Garmon* preemption. *See also Britt* v. *Grocers Supply Co., Inc.*, 978 F.2d 1441 (5thCir. 1992); *reh'g denied*, 986 F.2d 97 (5th Cir. 1993), *cert. denied*, 508 U.S. 960 (1993).

C. *Comity deference is a two-way street.*

To allow the MCAD to proceed in a case that basically sounds in federal labor law would be to do an ill far greater than that which dissent and Petitioner assert is being done by the majority decision. Were their arguments to be given effect, a federal agency, vested with exclusive jurisdiction over the interpretation and application of federal labor law for the last sixty years, would itself be ousted of jurisdiction and its judgment, its right of interpretation and its right to settle cases would be substantially undermined by the asserted mandatory deference to a state agency with no special expertise in the labor relations field and without any mandate to interpret federal labor law. Because of the assertion of gender, that state agency would thereby be permitted fundamentally to undermine what the federal agency has already accomplished. The NLRB had resolved the issue of whether Doulamis was discriminated against in her union activity regardless of employer motivation. Whether it was a gender based motiva-

tion or not is beside the point. The overriding question is whether there has been discrimination in her *union activity*. That is a federal question.

The misconception which the dissent appears to make is that the MCAD still has the right to decide that same question, but to concern itself with whether there was discrimination against Doulamis in her union activity, this time focusing on the question of whether the employer's motivation was gender based. There can be no getting around the fact that this would heavily involve the state agency in doing the work of the National Labor Relations Board.

II. The Case Was Properly Decided Under Applicable Supreme Court Abstention Doctrine.

In the most extensive and up-to-date analysis of Supreme Court abstention doctrine to date, James C. Rehnquist, in his article *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049 (1994), pointed out that there are five different types of abstention generally identified by the name of the case that first introduced the particular doctrine. The five, according to his analysis, are as follows:

> Thus, Pullman abstention is required where decision of a federal constitutional issue can be avoided by deferring to a state court's resolution of an unsettled law issue, *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); Burford abstention is required where concurrent federal jurisdiction would disrupt a complex state regulatory regime, *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); Thibodaux abstention is required, or at least permissible, where a state law issue is unsettled and politically sensitive, *Louisiana Power & Light* v. *City of Thibodaux*, 360 U.S. 25 (1959); Younger abstention is required where the federal defendant has commenced criminal or civil enforcement proceedings in state court against the fed-

> eral plaintiff, *Younger* v. *Harris*, 401 U.S. 37 (1971); and Colorado River abstention requires a federal court to defer in limited circumstances to duplicative, ongoing state court litigation, *Colorado River Water Conserv. Dist.* v. *United States*, 424 U.S. 800 (1976).

Rehnquist, *supra*, at 1050.

Both in the dissent, and in the Brief by the Attorney General by and on behalf of the Massachusetts Commission Against Discrimination (MCAD), the authors confuse *Younger*, *Colorado River*, and *Burford* and mingle the three separate theories of abstention together to assert that a majority of the First Circuit panel decided the instant case incorrectly.

It is respectfully submitted, consistent with the analysis done by Attorney Rehnquist, that different standards are operative, depending upon which doctrine of abstention is being applied. However, it is also submitted that, under the *Younger* doctrine particularly, it is inappropriate to characterize abstention as mandatory. As Rehnquist notes, Justice Black properly characterized abstention as a comity doctrine and relegated it to the status of a mere "notion" in the *Younger* case. *Younger*, 401 U.S. at 37 n.101; Rehnquist, *supra*, at 1066. Justice Frankfurter also referred to the concept of comity as "fluid" and "ill-defined." *Williams* v. *North Carolina*, 325 U.S. 226, 228 (1945), *reh'g denied*, 325 U.S. 895 (1945).

It should be noted, incidentally, that the Supreme Court explicitly rejected *Burford* abstention in the cases of *Colorado River* and in *NOPSI* as well. The Court in the *Colorado River* case found that federal decision of state law issues would not "impair efforts to implement state policy as in *Burford*." *Colorado River*, 424 U. S. 800 n. 163. In *NOPSI*, the court found that *Burford* abstention was improper where federal adjudication of the federal preemption issue would not disrupt state efforts to ensure administrative uniformity and that federal adjudication did not require expertise in local facts or policies. *NOPSI*, 491 U.S. at 350 n. 165.

The citation to *NOPSI* is particularly inappropriate where the court decided that the *Younger* abstention doctrine did not apply in that particular case. Therefore, any references to how *Younger* might be applied in the instant case invoke mere dicta. Confirmation of this interpretation of the *NOPSI* case and its inapplicability to the present case is contained in the decisions of the First Circuit in *Trailer Marine Transport Corp.* v. *Rivera-Vazquez*, 931 F.2d 961 (1st Cir. 1991) and that of *Fragoso* v. *Lopez*, 991 F.2d 878 (1st Cir. 1993). Accord *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781, 788 n.10 (4th Cir. 1991); *Evans* v. *Dale*, 896 F.2d 975 (5th Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 6352 (5th Cir. 1990); *Norfolk & Western Railway Co.* v. *Public Utilities Commission of Ohio*, 926 F.2d 567, 572 (6th Cir. 1991), *reh'g denied*, 1991 U.S. App. LEXIS 7104 (6th Cir. 1991) (stating, "in *NOPSI*, the Supreme Court did not address the issue of the application of the abstention doctrine to a pending or ongoing state administrative proceeding." *Allegheny Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990), *reh'g denied*, 1990 U.S.App. LEXIS 5250 (7th Cir. 1990). Hence, the heavy reliance placed by both the dissent and by defendant-appellee upon the *NOPSI* decision is clearly misplaced.

Moreover, the petitioner erroneously states that the Supreme Court has made it clear that, even when a court is faced with a claim of preemption, abstention under *Younger* is "nevertheless required when the plaintiff is seeking to enjoin a pending state administrative proceeding" Pet.6. This simply is not the law, since that statement does not recognize the exception which even the *NOPSI* case permits and which the case of *Bud Antle, Inc.* v. *Barbosa*, 35 F.3d 1355 (9th Cir. 1994), *modified*, 45 F.3d 1261 (9th Cir. 1994) makes manifest, namely, that, where preemption is "readily apparent", abstention is improper. Here, just as in that case, it is "readily apparent" that the *Garmon* doctrine ousts the MCAD of jurisdiction. The reason for this is not, as the dissent assumes and Petitioner avers, that the NLRA preempts state anti-

discrimination laws or ousts the EEOC of jurisdiction, but it is because it is readily apparent that the *case* which Doulamis seeks to bring is preempted under the *Garmon* doctrine.

CONCLUSION

It is respectfully submitted that Petitioner has failed to state any grounds, based on the facts of the instant case, upon which to compel this honorable Court to grant the Writ of Certiorari. It is submitted that Petitioner's request be denied.

Respectfully submitted,

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October Term, 1995

MASSACHUSETTS COMMISSION
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CHAULK SERVICES, INC.,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether a sex discrimination claim brought against an employer under Massachusetts' anti-discrimination statute, Mass. G.L. c. 151B, § 4 (1995), is preempted by the National Labor Relations Act, 29 U.S.C. §141 et seq. (1994 Ed.), when the factual setting of a case gives rise to a state law claim of sexual discrimination and an unfair labor practice charge under the NLRA.

LIST OF PARTIES

The Parties to the proceeding below were appellee-petitioner Massachusetts Commission Against Discrimination, defendants-appellees Petrina Doulamis Sullivan and International Association of Emergency Medical Technicians (EMTs) & Paramedics National Association of Government Employees (NAGE), American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and appellant-respondent Chaulk Services, Inc.

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Opinion Below

The judgment of the United States District Court of the District of Massachusetts is not reported and is reprinted in Appendix hereto, Pet. App. 1A-4A. The opinion of the United States Court of Appeals for the First Circuit is reported at 70 F.3d 1361 (1st Cir. 1995). It is reprinted in the petitioner's Appendix hereto, Pet. App. 5A-74A.

Jurisdiction

The United States Court of Appeals for the First Circuit issued its opinion and judgment on November 27, 1995. Pet. App. 6A. The Commission's petition for rehearing and suggestion for rehearing en banc was denied on January 18, 1996. Pet. App. 75A-76A. The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994).

Statutes and Constitutional Provisions Involved

The National Labor Relations Act (NLRA), 29 U.S.C. §158(1994); Massachusetts General Laws (Mass. G.L.) Chapter 151B, Sections 3, 4, and 5 (1994 ed.), set forth in Petitioner's Appendix at Pet. App. 98A-158A. 29 C.F.R. §1601.12 (1995) is set forth in Petitioner's Appendix at Pet. App. 159A-168A.

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2700 attorneys who specialize in representing persons involved in employment related controversies. Many of the NELA members' clients are also members of unions. These particular clients will be

significantly harmed if their rights to redress under employment discrimination laws are foreclosed by federal labor law preemption. Thus, NELA has a substantial interest in ensuring that this group of clients are not disadvantaged by any unduly broad and intrusive applications of federal labor law preemption.

NELA is qualified to brief this Court on the implications of its decision in this case. It has participated as amicus curiae in other cases involving employment laws, including Varity Corp. v. Howe, 64 U.S.L.W. 4138 (March 19, 1996), John Hancock Mut. Life Insurance co. v. Harris Trust & Savings Bank, 114 S.Ct. 517 (1993) and Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

The position NELA takes in the following brief has not been coordinated with, or financed by, the petitioner or her counsel. The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

STATEMENT OF THE CASE

In the fall of 1993 the International Association of EMTs and Paramedics, NAGE, AFL-CIO ("Union") was conducting a union organizing campaign at Chaulk Services, Inc. ("Chaulk"). A Chaulk employee at that time, Petrina Doulamis ("Doulamis"), became an advocate for unionization. In October, she and a fellow male employee, Eric Burgess, co-authored a letter to Chaulk management outlining their support for the union. Pet. App. 8A.

Thereafter, Doulamis became the target of disciplinary action for conduct which allegedly occurred at work. Pet. App. 44A. No such action was taken against Burgess. Pet. App. 44A.

Chaulk's actions prompted the Union to file unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board") on November 29, 1993 and again on December 6 and 9, 1993, alleging that Chaulk had discriminated against Doulamis because of her union activities. Pet. App. 8A-9A. Ultimately, these complaints were resolved when Chaulk and the Board reached a settlement agreement in March 1995. Pet. App. 10A-11A.

However, as a consequence of Chaulk's treatment of Doulamis, Doulamis filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") on December 1, 1993, alleging that Chaulk officials had violated Mass. G.L. c. 151B, § 4 by discriminating against her on the basis of her gender.

Chaulk then filed a motion with the MCAD on February 18, 1994 to dismiss Doulamis' claim for lack of subject matter jurisdiction. Its grounds were that the claim was preempted by the NLRA. Pet. App. 11A. Reasoning that the resolution of Doulamis' claim posed no problem of interference with the Board's jurisdiction, the MCAD issued an order denying Chaulk's motion. Pet App. 48A.

Thereafter, Chaulk filed suit in the United States District Court for Massachusetts seeking declaratory and injunctive relief barring the MCAD from hearing Doulamis' claim. Relying on Younger v. Harris, 401 U.S. 37 (1971), the District Court abstained from deciding the merits of Chaulk's preemption claim and dismissed the case. Pet. App. 3A-4A. On appeal, the United States Court of Appeals for the First Circuit reversed, finding that it was "readily apparent" from the face of Doulamis' complaint that it was preempted by the NLRA and therefore abstention was inappropriate. Pet. App. 36A-37A.

REASONS FOR GRANTING THE WRIT

NELA's primary basis for supporting the petitioner is that the decision of the Court of Appeals is inconsistent with the decisions of this Court and the Massachusetts Supreme Judicial Court which delineate the proper scope of federal labor law preemption. The Court of Appeals decision will further burden Massachusetts in its efforts to achieve full and effective enforcement of its fair employment practices laws. At the same time, it adds nothing in the way of shielding the NLRA from conflicting state regulation. Furthermore, the decision fails to give effect to the equally important national policy of eliminating discriminatory practices from the work place. Rather, the decision will only compound the harm caused by unlawful employment discrimination by denying to victims the full rights and remedies to which they are entitled under anti-discrimination laws. For these reasons, NELA supports the petitioner's request for review by this Court.

I. The Court of Appeals Decision Conflicts With Massachusetts Court Decisions Holding That Massachusetts' Anti-Discrimination Laws Fall Within The "Local Interest" Exception To Garmon Preemption

As the petitioner explained in its brief, the Massachusetts courts have already concluded that its anti-discrimination laws are not preempted by the NLRA. Massachusetts Electric Co. v. Massacusetts Comm'n Against Discrimination, 375 Mass. 160, 173-77, 375 N.E.2d 1192 (1978). At least one of the reasons for the Court's decision was Massachusetts' important interest in enforcing its own laws against discrimination. Id. at 174.

Although the Court of Appeals agreed that Massachusetts has a significant interest in protecting its employees from sex discrimination, its decision directly conflicted with the holding of the Supreme Judicial Court in Massachusetts Electric Co., Pet. App. 20A. The Court should grant the petitioner's writ on this basis alone.

Furthermore, Massachusetts' long history of support for anti-discrimination laws demonstrates that this is a concern deeply rooted in local feeling and responsibility. Under San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), the lead case on NLRA preemption, this is an interest which normally exempts a state law from the preemptive effects of the NLRA.

Garmon established a basic framework for courts to use in analyzing whether state law is preempted by federal labor law. It held that:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

Garmon, 359 U.S. at 244.[1]

---

[1] Section 7 of the NLRA guarantees employees the right to self-organization and the right to engage in concerted activities for purposes of collective bargaining. Section 8 enumerates unfair labor practices which § 10(a) of the Act empowers the Board to enjoin. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with

However, the Garmon Court also recognized that Congress did not intend to preclude state regulation in all instances where state law and federal labor law might overlap. Thus, important exceptions to the Garmon rules apply where state regulation is (1) of only "peripheral concern" to the NLRA or (2) touches:

> . . .interests so deeply rooted in local feeling and responsibility, that in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-244. Accordingly, these laws may only be preempted if Congress clearly indicates that this is its intention.[2]

> employee rights guaranteed by § 7, while § 8(a)(3) prohibits employers from discriminating on the basis of union membership. The Court of Appeals relied on the second prong of the Garmon test by finding that Chaulk's conduct was arguably prohibited by § 8(a) of the Act. Pet. App. 18A.

[2] Fighting discrimination has traditionally been important in Massachusetts. See generally, Heins, Massachusetts Civil Rights Law, 76 Mass. L. Rev. 26 (1991). Massachusetts was among one of the first states in the nation to outlaw racial discrimination in public accommodations, and it was also one of the earliest states (1946) to adopt a modern fair employment practices statute. Further, the Supreme Judicial Court has held:

> [the] clear purpose of G.L c. 151B [the Massachusetts anti-discrimination statute]

There is no compelling indication that Congress intended that state law claims of sex discrimination should be preempted by the NLRA. To the contrary, the structure of this federal law makes clear that Congress intended state anti-discrimination statutes to play a significant role in eradicating discriminatory practices from the workplace.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994 Ed.), the federal counterpart to Mass. G.L. c. 151B, expressly reserves to the states the right to enforce their own fair employment practices laws. 42 U.S.C. § 2000e-7 (1994 Ed.). Moreover, Congress even went so far as to integrate state law into the federal scheme by requiring federal complainants to seek redress initially under state law. 42 U.S.C. § 2000e-5(c) (1994 Ed.).

Indeed, this Court has recognized the significance of the states in the enforcement of our discrimination laws. It has noted that Title VII was designed to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver, 415 U.S. 36, 48-49 (1974). In view of the pivotal role Congress has given to state anti-discrimination laws in the prosecution of all discrimination claims, the plausible inference is that Congress did not intend to preempt these laws by the NLRA.

> is to implement the right to equal treatment guaranteed to all citizens by the constitutions of the United States and the Commonwealth.

Katz v. Massachusetts Commission Against Discrimination, 312 N.E.2d 182, 187 (1974)

Finally, as Judge Lynch pointed out in her well-reasoned dissent, in Brown v. Hotel & Restaurant Employees, International Union Local 54, 468 U.S. 492, 509 (1984), this Court held that a New Jersey law regulating the electoral qualifications for union representatives in the casino industry was not preempted by §7 of the NLRA. The Court found that sections 504 and 603(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et seq. at §§504 and 523(a)(LMRDA)(1994 Ed.), specifically allowed for state regulation as to these qualifications. The LMRDA's reservation of states' rights in this area evidenced Congress' intent that employees' rights to select representatives of their choice under §7 of the NLRA was not absolute. In light of the Congress' reservation of the states' rights to enforce the anti-discrimination laws in Title VI, a similar analysis is warranted here.

II. Inasmuch As Preemption Here Would Deny Victims Of Discrimination The Ability To Obtain Their Full Rights And Remedies Under Anti-Discrimination Laws, It Is Wholly Inappropriate

The Court should also be aware that, if it denies the petitioner's writ, such a denial will adversely affect discrimination victims. These victims will be prevented from attaining their full rights presently granted to them under state law. At the same time, those same rights will not be fully protected by the NLRA.

Under Massachusetts law, complainants who prove that their employers discriminated against them on the basis of gender may be awarded both compensatory and punitive damages. Mass. G.L. c. 151B, § 9. See, Fontaine v. Ebtec Corp., 613 N.E.2d 881, 887-890 (1993). These same damage remedies are also available to complainants under Title VII. 42 U.S.C. § 1981a(a)(1994 Ed.).

The above remedies are not available under the NLRA, however. Under § 10(c) of the NLRA, the remedial authority of the Act's enforcement arm, the NLRB, only allows it to "take such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. §160(c)(1994 Ed.). This power has been interpreted to limit the Board to issuing remedies which restrain violations of the Act. Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 219-220 (1938).

Though the Board is allowed discretion to make compensatory awards, these are largely limited to awards of backpay, with some exceptions for extraordinary violations. Awards for pain and suffering are beyond the Board's authority. See generally, Douglas S. McDowell, NLRB Remedies For Unfair Labor Practices, Labor Relations and Public Policy Series, Report No. 12 (1974). Likewise, the Board has no authority to award punitive damages. Consolidated Edison, 305 U.S. at 219-220.

The denial of damage remedies to individual discrimination victims is in direct conflict with Massachusetts' judgment that these victims are entitled to more complete compensation than is warranted under the NLRA. More importantly, however, the damage remedies in a discrimination case are central to ensuring the eradication of discrimination in the workplace inasmuch as these remedies deter employers from engaging in discriminatory practices. Albemarle Paper Company v. Moody, 422 U.S. 405 at 418 (1975). Thus, the public at large is hurt if the NLRA is allowed to preempt state anti-discrimination laws.

Similarly, federal labor preemption is unwarranted here because it would severely limit the ability of complainants to obtain attorney's fees. As with damages remedies, both Chapter 151B and Title VII allow victims to collect awards for attorney's fees if they are able to prove discrimination. Mass. G.L. c. 151B, § 9; 42 U.S.C.

§ 2000e-5(k) (1994 Ed.). Like damage awards, these fee awards contribute in a very meaningful way to achieving the goal of a discrimination-free workplace by ensuring that victims who might not otherwise be able to afford legal counsel will be able to obtain representation. However, in contrast to the Massachusetts discrimination laws, the established practice of the Board under the NLRA is to award attorney's fees only in the case where a employer asserts a patently frivolous defense. Heck's Inc., 215 NLRB 765 (1974). Thus, in order that victims of discrimination continue to have realistic and viable avenues to obtain representation in the prosecution of their cases, NLRA preemption should not be applied to these laws.

III. The Court Of Appeal's Decision Has Erroneously Applied The Law Of Federal Labor Preemption As This Court Has Interpreted It

The final reason for granting the petition is that the Court of Appeals' decision is in conflict with other controlling precedent of this Court. In holding that Ms. Doulamis' gender discrimination claim before the MCAD was preempted by the NLRA, the Court of Appeals relied, not only on San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), but also on Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978). In doing so, the Court clearly misapplied Sears, Roebuck, as well as Garmon.

Inasmuch as sex discrimination, the conduct at issue in this case, is not protected by the NLRA, the Court recognized that it must use the standard established by Sears, Roebuck for conduct which is "arguably prohibited" by the NLRA. Pet. App. 21A-25A. For Garmon preemption to apply under this standard:

> the critical inquiry . . . is not whether the state is enforcing a law specifically relating to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been presented . . . to the Labor Board.

Sears, Roebuck, 436 U.S. at 197 (emphasis added).

After evaluating Doulamis' claim in light of the Sears, Roebuck standard, the Court of Appeals concluded that her claim before the MCAD was "the same in a fundamental respect" with the Union's unfair labor practice charges before the Board. Pet. App. 24A. The Appeals Court based its decision on Doulamis' allegation that she was targeted for harassment for union activities to the exclusion of other male union supporters. Significant to the Court's analysis was the fact that the Board had assumed jurisdiction over the Union's unfair labor practice charges against Chaulk, that Doulamis' claim arose out of the same factual setting as these charges, and that the MCAD would necessarily have to make a determination as to whether Doulamis was engaged in protected union activities in order to resolve her complaint. Pet. App. 21A-25A.

The Court's approach, however, completely misinterpreted Sears, Roebuck. When the conduct at issue is arguably prohibited by the NLRA, the critical factor is whether the controversies are identical, not whether they are related or that they arise out of a common factual setting. Sears, Roebuck, 436 U.S. at 194-97. Thus, whether the Board has or has not assumed jurisdiction over the Union's charges is of no relevance in and of itself. What matters is the specific inquiry the respective agencies would make as they investigate the allegations.

In the Union's case before the Board, the focus of inquiry would be whether Chaulk had threatened Doulamis with dismissal because of her union activities. See, Frick Paper Co. 319 NLRB No.3 (1995). In contrast, the MCAD's investigation would focus upon whether Doulamis was treated differently from the other men who were engaged in union activities, and, if so, whether this treatment was gender motivated. See, Beal v. Board of Selectmen of Hingham, 646 N.E.2d 131(1995); Rideout v. Crum & Forster Commercial Ins., 633 N.E.2d 376(1994). Indeed, in this respect, Doulamis' MCAD claim is fundamentally no different than if she were alleging that Chaulk had allowed its male employees to eat in the break room, while at the same time prohibiting women from doing so; or that Chaulk allowed the men to violate work rules and yet enforced the same rules against the women.

Moreover, the fact that the Court of Appeals found that there were common facts between the claims before the Board and the MCAD is not determinative. Factual parallelism in and of itself does not militate for preemption in "arguably prohibited" cases. Rather, preemption hinges on whether the legal analysis to be applied to the facts would be the same. See, Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 408-410 (1988); Sears, Roebuck, 436 U.S. at 196-197.

Finally, as the above discussion has made clear, the MCAD would not have to make any determinations as to whether Doulamis was engaging in protected union activities in order to resolve her complaint. All the MCAD would need to determine is whether Doulamis was treated differently from the men because she was a women. Indeed, the MCAD was specific on this point in its order denying Chaulk's motion to dismiss.

Thus, the Court of Appeals's preemption analysis was fundamentally wrong. It more closely resembled the standard

established by Sears, Roebuck for conduct "arguably protected" by the NLRA. This standard focuses merely on whether the NLRB has clear jurisdiction over the controversy and whether the state action clearly poses dangers for the integrity of that jurisdiction.

In view of the fundamental differences between the two claims, there is no basis for concluding that MCAD jurisdiction would pose any danger of conflict with the Board's. Accordingly, Garmon preemption is inapplicable. Inasmuch as the Court of Appeals misapplied U.S. Supreme Court precedent, as well as Massachusetts precedent, this Court should grant review.

CONCLUSION

The serious errors in the decision of the Court of Appeals, combined with the conflicts with other decisions and the important public interests affected by the decision, warrant review of that decision by this Court. For the foregoing reasons, NELA

respectfully requests the Court to grant the petitioner's writ of certiorari.

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In The

Supreme Court of the United States

October Term, 1995

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,

Petitioner,

v.

CHAULK SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CONNECTICUT, HAWAII, MAINE, MONTANA, NEW JERSEY, OKLAHOMA AND PENNSYLVANIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The States of Arizona, Connecticut, Hawaii, Maine, Montana, New Jersey, Oklahoma and Pennsylvania, through their respective Attorneys General, urge this Court to grant the petition for a writ of *certiorari* because the decision of the Court of Appeals for the First Circuit is emblematic of a line of cases which unwarrantedly have created a "preemption exception" to the operation of the abstention doctrine in the context of challenges to state administrative proceedings. There is no principled basis on which to disregard the *Younger v. Harris*, 401 *U.S.* 37 (1971) doctrine in an ongoing state proceeding which is judicial in nature, involving important state interests, and in which there is full opportunity to raise the federal question, merely because such federal question is one of preemption. In a wide variety of state quasi-judicial proceedings – including but not limited to those involving enforcement of state civil rights laws, the setting here – state administrative agencies are faced with federal preemption claims. To permit federal court interference with a state administrative proceeding simply because a colorable claim of preemption is raised would constitute a striking denigration of the states' ability to enforce federal law faithfully, cutting squarely against the federalism and comity underpinnings of *Younger* and its progeny (most notably the case recognizing *Younger*'s applicability to quasi-judicial hearings, *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 *U.S.* 619 (1986)). In essence, the decision below (as well as certain other Circuit Court of Appeals decisions upon which the court below relies) would render *Younger* a nullity in the myriad of state administrative proceedings in which arguable federal

preemption claims can be asserted. This would seriously undermine the states' ability to enforce laws (such as the anti-discrimination statute involved here) arising out of deeply rooted state interests.

Amici also urge that this Court grant *certiorari* on the second question presented by petitioner: whether the National Labor Relations Act, 29 *U.S.C.* § 151 *et seq.* ("NLRA"), preempts a state law prohibiting gender discrimination in employment merely because the facts underlying the discrimination action overlap with NLRA-regulated activity. The large majority of cases brought under state civil rights statutes involve claims of employment discrimination. As this case demonstrates, factual allegations supporting a state law discrimination claim readily can touch on conduct regulated by the NLRA. The court below erred in finding preemption merely because the facts underlying the state discrimination claim in part coincided with facts supporting an NLRA unfair labor practice charge. *Amici* respectfully submit that the decision below will be very deleterious to the states' enforcement of their anti-discrimination statutes. While a state certainly is preempted from regulating NLRA-covered union activity, the mere fact that a discrimination claim arises in the setting of a union organizational effort does not warrant preemption of a state's civil rights law.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW INAPPROPRIATELY CREATES AN EXCEPTION TO THE *YOUNGER* ABSTENTION DOCTRINE SIMPLY BECAUSE OF THE EXISTENCE OF AN ARGUABLE FEDERAL PREEMPTION CLAIM.

Prior to this Court's decision in *New Orleans Public Service, Inc. v. Counsel of City of New Orleans*, 491 *U.S.* 350 (1989) ("NOPSI"), various Circuit Courts of Appeal had held that the *Younger* abstention analysis should not apply in cases involving claims of federal preemption because "comity . . . is not strained when a federal court cuts off state proceedings that entrench upon the federal domain." *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm.*, 772 *F.*2d 404, 417 (8th Cir. 1985), *cert. den. sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, 474 *U.S.* 1102 (1986). *See also, Kentucky West Va. Gas Co. v. Penn. Public Ut. Comm.*, 791 *F.*2d 1111, 1116-17 (3d Cir. 1986); *Champion Int'l. Corp. v. Brown*, 731 *F.*2d 1406, 1408-09 (9th Cir. 1984). In contrast, other courts had rejected arguments that *Younger* abstention principles are inapplicable where federal preemption is asserted. *See, e.g., Potomac Electric Power Co. v. Sachs*, 802 *F.*2d 1527, 1531 (4th Cir. 1986), *vacated on other grounds*, 484 *U.S.* 1022 (1988) (it would be "anomalous to hold that a state court may decide federal constitutional issues but is unqualified or inhibited from deciding preemption issues"); *Brotherhood of Loc. Eng. v. Commission Against Discrimination*, 695 *F. Supp.* 1321, 1324-25 (D. Mass. 1988); *Fore Way Express, Inc. v. Wisconsin Dept. of Ind.*, 660 *F. Supp.* 310, 313 (E.D. Wisc. 1987).

This Court in *NOPSI* seemingly put this split to rest. In *NOPSI*, petitioner had asserted that the second prong of the test for *Younger* abstention articulated in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 *U.S.* 423, 432 (1982) – the existence of "an important state interest" – is not met where there is a "substantial claim" of federal preemption because such claim "calls into question the prerequisite of *Younger* abstention that the State have a legitimate, substantial interest in its pending proceedings." *NOPSI, supra*, 491 *U.S.* at 364. In speaking for this Court, Justice Scalia responded:

> We disagree. There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees. . . . [*Id.* at 365]

Therefore, even a "substantial" preemption claim does not negate the operation of the abstention doctrine. *Id.* at 367.

Petitioner in *NOPSI* also argued that "a facially conclusive" preemption claim should render abstention inappropriate. Justice Scalia responded: "Perhaps so. But we do not have to decide the matter here," as the preemption question necessitated "further factual inquiry – and what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination." *Id.*

Despite this holding, the court below inappropriately seized on the above-quoted unanswered hypothetical to continue to recognize what essentially is a "preemption exception" to the *Younger* doctrine. The danger of such

unwarranted stretching of the "facially conclusive" language in *NOPSI* is seen in how the court below collapsed the *Younger* abstention issue into a determination of the preemption claim's merits. Even though this Court in *NOPSI* squarely *rejected* the view that a federal court "should take a quick look at the merits" of the preemption claim and if it "appears substantial . . . endeavor to resolve it," *id.* at 364-365, this is precisely what the court below did, extensively discussing the merits of the preemption issue before addressing the State's abstention defense. Pet. App. 8A-25A. And as a review of the decision makes clear, the preemption claim here is anything but "facially conclusive". Even though the complainant before the Massachusetts Commission Against Discrimination was not seeking to enforce any NLRA rights, instead alleging that she was harassed and differentially treated by her employer based on her sex, the majority delved into the facts of this case, to the extent of relying on the agency's investigative interrogatories to conclude that the sex discrimination claim in reality is one involving an unfair labor practice. Pet. App. 22A, 23A, 36A. Moreover, that the preemption claim is not "facially conclusive" is underscored by the thoughtful discussion of this question by Circuit Judge Lynch in dissent, who concludes that the state action should *not* be preempted by the NLRA. Pet. App. 39A-61A.

Should the Court of Appeals' inappropriate construction of the "facially conclusive" hypothetical in *NOPSI* be accepted, virtually every non-frivolous preemption claim will be captured by this approach, whereby the federal court analyzes the merits of the preemption claim before

addressing abstention, leading to inappropriate adjudication by lower federal courts of an issue which state courts (and administrative bodies) are fully capable of deciding. That such concern is justified is seen by the fact that this matter is not the only post-*NOPSI* Circuit Court of Appeals decision authorizing a preemption-based federal injunction against a state proceeding which otherwise meets the *Younger* criteria. *See Bud Antle, Inc. v. Barbosa*, 45 *F.*3d 1261, 1272-73 (9th Cir. 1994) (federal court injunction issued against ongoing proceeding before California Agricultural Labor Relations Board because of alleged preemption by NLRA); *Freehold Cogeneration v. Bd of Reg. Comm. of New Jersey*, 44 *F.*3d 1178, 1187, n. 6 (3d Cir. 1995), *cert. den.* ___ *U.S.* ___, 116 *S.Ct.* 68, 113 *L.Ed.*2d 29 (1995) (state rate-making hearing enjoined because of federal preemption).[1] *See also, Olde Discount Corp. v. Tupman*, 1 *F.*3d 202, 206-215 (3d Cir. 1993) (state proceeding for securities law violation enjoined because of preemption by Federal Arbitration Act, despite the absence of any

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[1] This is not to argue that the substantive preemption decisions in *Bud Antle* or *Freehold* necessarily were wrong. Rather, these decisions involve preemption claims in which the Circuit Courts of Appeals (as did the court below) engaged in a close examination of the merits of substantial but not "facially conclusive" preemption claims, precisely what this Court warned against in *NOPSI*. For example, the preemption question in *Bud Antle* turned on a heavily fact-sensitive issue of whether employees who handle and process agricultural goods are "agricultural laborers" exempt from NLRA coverage and subject to state regulation. Similarly, the preemption issue in *Freehold* was highly complex, relating to the interplay of state utility rate proceedings and the federal Public Utilities Regulatory Policies Act, requiring the court to engage in a detailed analysis of the state administrative hearing.

determination that preemption was "facially conclusive"); *Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (action to enforce state contractors' licensing requirement enjoined because federal preemption was "readily apparent"). *Contra, CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. den.*, 502 U.S. 812 (1991) ("to hold that a state court may decide Federal constitutional issues generally but should not decide preemption issues makes little sense"); *Employer Resource Management Co., Inc. v. Shannon*, 65 F.3d 1126, 1136 (4th Cir. 1995) (same).

At heart, the decision below manifests a distrust of the ability of state courts and administrative agencies to adjudicate federal preemption issues fairly. This distrust is misplaced, as state courts, and state agencies acting in a quasi-judicial capacity, routinely decide preemption issues (including those involving employment law, the setting here), often finding that federal law displaces the state proceeding. *See, e.g., Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986), *cert. den.*, 479 U.S. 820 (1986) (ERISA preempts action under state anti-discrimination statute involving pension benefits); *Johnson v. Jaffray, Inc.*, 530 N.W.2d 790 (Minn.1995) (Federal Arbitration Act preempts state law discrimination action against securities broker); *Brotherhood of Maintenance of Way Emp. v. Chicago and Northwestern Transp. Co.*, 514 N.W.2d 90 (Iowa 1994) (Railway Labor Act preempts state statute on employee drug and alcohol testing); *Beaman v. Yakima Valley Disposal, Inc.*, 807 P.2d 849 (Wash. 1991) (state wrongful discharge claim preempted by NLRA). And more importantly, such distrust has been squarely repudiated by this Court in *Younger* and its progeny, which militate against

assuming federal jurisdiction where it would "reflect negatively" upon the willingness and ability of the state forum to apply federal law faithfully. *See, e.g., Juidice v. Vail*, 430 *U.S.* 327, 336 (1977).

For these reasons, *amici curiae* respectfully request that the petition for a writ of *certiorari* on the significant *Younger* abstention issue raised by this matter be granted.

II. THE PETITION SHOULD BE GRANTED BECAUSE DISCRIMINATION ACTIONS BROUGHT UNDER STATE LAW ARE NOT PREEMPTED EVEN WHEN ARISING FROM CONDUCT WHICH ALSO VIOLATES THE NLRA.

By holding that states are preempted from enforcing their anti-discrimination laws under circumstances involving conduct that is also encompassed by the NLRA, the majority misinterpreted Congressional intent and failed to give due regard to the importance of the states' interest in addressing discrimination by employers.[2]

That state and federal statutes may address the same basic areas of the law does not automatically compel a

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[2] Massachusetts asserts in the Petition (at 21-23) that the majority opinion below conflicts with a holding of the Massachusetts Supreme Judicial Court that a cause of action under the state's anti-discrimination action was not preempted by the NLRB. *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 *Mass.* 160, 375 *N.E.*2d 1192 (Mass. 1978). Similar decisions have also been made by the Supreme Courts of Iowa (*Franklin Manufacturing Co. v. Iowa Civil Rights Com.*, 270 *N.W.*2d 829, 834 (Iowa 1978)) and Alaska (*Bald v. RCA Alascom and Teamsters Local 359*, 569 *P.*2d 1328, 1335 (Alaska 1977)).

finding of federal preemption. Fighting discrimination, for instance, has consistently been recognized as an important exercise of the states' police powers. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 *U.S.* 537, 548 (1987). In such areas where the states have traditionally acted, the states are not to be deemed superseded unless that is "the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, 516 (1992).[3]

San Diego Building Trades Council v. J.S. Garmon, 359 *U.S.* 236, 244 (1959), sets forth the general rule that a state may not regulate any activity which clearly or by reasonable inference falls within the scope of the NLRA. However, the states are not necessarily preempted in all areas which may fall within the broad scope of the NLRA. They may continue to regulate with respect to: (1) matters which "merely peripheral[ly] concern" the Act, and (2) "where the regulated conduct touched interests so deeply

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[3] Thus, it has been held that even ERISA, which contains an express provision preempting inconsistent state law (unlike the NLRA), does not necessarily preempt state anti-discrimination law. *Shaw v. Delta Air Lines*, 463 *U.S.* 85, 102-103 (1983). To interpret ERISA as completely preemptive of a state civil rights law would preclude the EEOC from referring claims to state agencies and frustrate the goal of Title VII to encourage joint enforcement. *Ibid. See also, Lingle v. Norge Div. of Magic Chef, Inc.*, 486 *U.S.* 399, 409-410 (1988) (under Section 301 of the Labor Management Relations Act, 29 *U.S.C.* § 185, an independent state cause of action may be pursued as long as it would not require interpretation of a collective bargaining agreement, even if dispute resolution under the LMRA and the state action would both require addressing precisely the same set of facts.)

rooted in local feeling and responsibility" that Congressional intent to preempt cannot be inferred. *Id.* at 234-235. As to enforcement of state anti-discrimination laws, both of these exceptions should be found to apply.

Focusing on the fact that both the NLRA action and the state discrimination claim in this case arose from the same conduct, the majority below failed to recognize the distinct aspects of this conduct being addressed by these separate laws. That discrimination in the workplace is not a principal concern of the NLRA is clear from cases holding that *federal* civil rights employment actions under Title VII, 42 *U.S.C.A.* § 2000e *et seq.*, are not preempted by the NLRA. This Court has expressly noted the coexistence of remedies under both statutes, observing, for example, that a Senate sponsor of the bill ultimately enacted as Title VII specifically declared that nothing in Title VII was intended to affect rights and obligations under the NLRA. *Alexander v. Gardner-Denver Co.*, 415 *U.S.* 36, 48, n.9 (1974), quoting 110 *Cong. Rec.* 7201 (1964). In fact, proposed amendments to make Title VII exclusive as to employment remedies were defeated. *Ibid.*

It is evident, then, that the NLRA does not preclude an individual harmed by an unlawful discriminatory employment practice from pursuing non-NLRA civil rights remedies, even though the discrimination arose in a context of NLRA-regulated activities. That Title VII allows for dual-filing of discrimination complaints with both the Equal Employment Opportunity Commission and state anti-discrimination agencies – thus expressly preserving all statutory rights – should not extinguish an

individual's state cause of action. Indeed, the Congressional intent is obviously otherwise. *Shaw v. Delta Air Lines, supra,* 463 *U.S.* at 102-103.

The second *Garmon* exception – the uniquely local aspect of anti-discrimination law enforcement – further supports the argument against preemption. The states' interest in prohibiting discrimination has been deemed "substantial" and "compelling" and is therefore a paramount basis for exercising their police powers. *Board of Directors of Rotary International v. Rotary Club of Duarte, supra; Ohio Civil Rights Comm. v. Dayton Christian Schools, supra,* 477 *U.S.* at 628. This is precisely why state civil rights statutes complement – and in fact play a significant part in – Title VII's enforcement scheme. Congress made clear that Title VII does not supersede state law in this area, and, as mentioned above, permits for preservation of a claimant's rights by providing for dual-filed complaints.

The eradication of discrimination in employment has long been recognized to be a supreme interest of the states. That such discrimination may arise in a context which also invokes the authority of the NLRB because it involves unlawful labor organizational practices should not deprive a victim of discrimination of the appropriate remedy for the violation of his or her civil rights. This intent was not expressed by Congress when it enacted the NLRA and should not be inferred therefrom.

In sum, *amici curiae* respectfully submit that the petition should be granted on this preemption issue, on which there is a split between the decision below and those of various state supreme courts, and which will

have a significant impact on the states' enforcement of their anti-discrimination laws.

CONCLUSION

For the foregoing reasons *amici curiae* states respectfully request this Court to grant the petition for a writ of *certiorari* on both the abstention and preemption questions raised by the petition.

Respectfully submitted,

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No. 95-1679

In The
Supreme Court Of The United States
October Term, 1995

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Petitioner,

v.

CHAULK SERVICES, INC.,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether a sex discrimination claim brought against an employer under Massachusetts' anti-discrimination statute, Mass. G.L. c. 151B, § 4 (1995), is preempted by the National Labor Relations Act, 29 U.S.C. §141 et seq. (1994 Ed.), when the factual setting of a case gives rise to a state law claim of sexual discrimination and an unfair labor practice charge under the NLRA.

LIST OF PARTIES

The Parties to the proceeding below were appellee-petitioner Massachusetts Commission Against Discrimination, defendants-appellees Petrina Doulamis Sullivan and International Association of Emergency Medical Technicians (EMTs) & Paramedics National Association of Government Employees (NAGE), American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and appellant-respondent Chaulk Services, Inc.

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Opinion Below

The judgment of the United States District Court of the District of Massachusetts is not reported and is reprinted in Appendix hereto, Pet. App. 1A-4A. The opinion of the United States Court of Appeals for the First Circuit is reported at 70 F.3d 1361 (1st Cir. 1995). It is reprinted in the petitioner's Appendix hereto, Pet. App. 5A-74A.

Jurisdiction

The United States Court of Appeals for the First Circuit issued its opinion and judgment on November 27, 1995. Pet. App. 6A. The Commission's petition for rehearing and suggestion for rehearing en banc was denied on January 18, 1996. Pet. App. 75A-76A. The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994).

Statutes and Constitutional Provisions Involved

The National Labor Relations Act (NLRA), 29 U.S.C. §158 (1994); Massachusetts General Laws (Mass. G.L.) Chapter 151B, Sections 3, 4, and 5 (1994 ed.), set forth in Petitioner's Appendix at Pet. App. 98A-158A. 29 C.F.R. §1601.12 (1995) is set forth in Petitioner's Appendix at Pet. App. 159A-168A.

INTEREST OF THE AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2700 attorneys who specialize in representing persons involved in employment related controversies. Many of the NELA members' clients are also members of unions. These particular clients will be significantly harmed if their rights to redress under employment discrimination laws are foreclosed by federal labor law preemption. Thus, NELA has a substantial interest in ensuring that this group of clients are not disadvantaged by any unduly broad and intrusive applications of federal labor law preemption.

NELA is qualified to brief this Court on the implications of its decision in this case. It has participated as amicus curiae in other cases involving employment laws, including Varity Corp. v. Howe, 64 U.S.L.W. 4138 (March 19, 1996), John Hancock Mut. Life Insurance co. v. Harris Trust & Savings Bank, 114 S.Ct. 517 (1993) and Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

The position NELA takes in the following brief has not been coordinated with, or financed by, the petitioner or her counsel. The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

STATEMENT OF THE CASE

In the fall of 1993 the International Association of EMTs and Paramedics, NAGE, AFL-CIO ("Union") was conducting a union organizing campaign at Chaulk Services, Inc. ("Chaulk"). A Chaulk employee at that time, Petrina Doulamis ("Doulamis"), became an advocate for unionization. In October, she and a fellow male employee, Eric Burgess, co-authored a letter to Chaulk management outlining their support for the union. Pet. App. 8A.

Thereafter, Doulamis became the target of disciplinary action for conduct which allegedly occurred at work. Pet. App. 44A. No such action was taken against Burgess. Pet. App. 44A.

Chaulk's actions prompted the Union to file unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board") on November 29, 1993 and again on December 6 and 9, 1993, alleging that Chaulk had discriminated against Doulamis because of her union activities. Pet. App. 8A-9A. Ultimately, these complaints were resolved when Chaulk and the Board reached a settlement agreement in March 1995. Pet. App. 10A-11A.

However, as a consequence of Chaulk's treatment of Doulamis, Doulamis filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") on December 1, 1993, alleging that Chaulk officials had violated Mass. G.L. c. 151B, § 4 by discriminating against her on the basis of her gender. Chaulk

then filed a motion with the MCAD on February 18, 1994 to dismiss Doulamis' claim for lack of subject matter jurisdiction. Its grounds were that the claim was preempted by the NLRA. Pet. App. 11A. Reasoning that the resolution of Doulamis' claim posed no problem of interference with the Board's jurisdiction, the MCAD issued an order denying Chaulk's motion. Pet App. 48A.

Thereafter, Chaulk filed suit in the United States District Court for Massachusetts seeking declaratory and injunctive relief barring the MCAD from hearing Doulamis' claim. Relying on Younger v. Harris, 401 U.S. 37 (1971), the District Court abstained from deciding the merits of Chaulk's preemption claim and dismissed the case. Pet. App. 3A-4A. On appeal, the United States Court of Appeals for the First Circuit reversed, finding that it was "readily apparent" from the face of Doulamis' complaint that it was preempted by the NLRA and therefore abstention was inappropriate. Pet. App. 36A-37A.

REASONS FOR GRANTING THE WRIT

NELA's primary basis for supporting the petitioner is that the decision of the Court of Appeals is inconsistent with the decisions of this Court and the Massachusetts Supreme Judicial Court which delineate the proper scope of federal labor law preemption. The Court of Appeals decision will further burden Massachusetts in its efforts to achieve full and effective enforcement of its fair employment practices laws. At the same time, it adds nothing in the way of shielding the NLRA from conflicting state regulation. Furthermore, the

decision fails to give effect to the equally important national policy of eliminating discriminatory practices from the work place. Rather, the decision will only compound the harm caused by unlawful employment discrimination by denying to victims the full rights and remedies to which they are entitled under anti-discrimination laws. For these reasons, NELA supports the petitioner's request for review by this Court.

I. The Court of Appeals Decision Conflicts With Massachusetts Court Decisions Holding That Massachusetts' Anti-Discrimination Laws Fall Within The "Local Interest" Exception To Garmon Preemption

As the petitioner explained in its brief, the Massachusetts courts have already concluded that its anti-discrimination laws are not preempted by the NLRA. Massachusetts Electric Co. v. Massacusetts Comm'n Against Discrimination, 375 Mass. 160, 173-77, 375 N.E.2d 1192 (1978). At least one of the reasons for the Court's decision was Massachusetts' important interest in enforcing its own laws against discrimination. Id. at 174.

Although the Court of Appeals agreed that Massachusetts has a significant interest in protecting its employees from sex discrimination, its decision directly conflicted with the holding of the Supreme Judicial Court in Massachusetts Electric Co., Pet. App. 20A. The Court should grant the petitioner's writ on this basis alone.

Furthermore, Massachusetts' long history of support for anti-discrimination laws demonstrates that this is a concern deeply rooted in local feeling and responsibility. Under San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), the lead case on NLRA preemption, this is an interest which normally exempts a state law from the preemptive effects of the NLRA.

Garmon established a basic framework for courts to use in analyzing whether state law is preempted by federal labor law. It held that:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

Garmon, 359 U.S. at 244.[1]

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[1] Section 7 of the NLRA guarantees employees the right to self-organization and the right to engage in concerted activities for purposes of collective bargaining. Section 8 enumerates unfair labor practices which § 10(a) of the Act empowers the Board to enjoin. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with employee rights guaranteed by § 7, while § 8(a)(3) prohibits employers from discriminating on the basis of union membership. The Court of Appeals relied on the second prong of the Garmon test by finding that

However, the Garmon Court also recognized that Congress did not intend to preclude state regulation in all instances where state law and federal labor law might overlap. Thus, important exceptions to the Garmon rules apply where state regulation is (1) of only "peripheral concern" to the NLRA or (2) touches:

> . . .interests so deeply rooted in local feeling and responsibility, that in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-244. Accordingly, these laws may only be preempted if Congress clearly indicates that this is its intention.[2]

Chaulk's conduct was arguably prohibited by § 8(a) of the Act. Pet. App. 18A.

[2] Fighting discrimination has traditionally been important in Massachusetts. See generally, Heins, Massachusetts Civil Rights Law, 76 Mass. L. Rev. 26 (1991). Massachusetts was among one of the first states in the nation to outlaw racial discrimination in public accommodations, and it was also one of the earliest states (1946) to adopt a modern fair employment practices statute. Further, the Supreme Judicial Court has held:

> [the] clear purpose of G.L c. 151B [the Massachusetts anti-discrimination statute] is to implement the right to equal treatment

There is no compelling indication that Congress intended that state law claims of sex discrimination should be preempted by the NLRA. To the contrary, the structure of this federal law makes clear that Congress intended state anti-discrimination statutes to play a significant role in eradicating discriminatory practices from the workplace.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994 Ed.), the federal counterpart to Mass. G.L. c. 151B, expressly reserves to the states the right to enforce their own fair employment practices laws. 42 U.S.C. § 2000e-7 (1994 Ed.). Moreover, Congress even went so far as to integrate state law into the federal scheme by requiring federal complainants to seek redress initially under state law. 42 U.S.C. § 2000e-5(c) (1994 Ed.).

Indeed, this Court has recognized the significance of the states in the enforcement of our discrimination laws. It has noted that Title VII was designed to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver, 415 U.S. 36,

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> guaranteed to all citizens by the constitutions of the United States and the Commonwealth.

Katz v. Massachusetts Commission Against Discrimination, 312 N.E.2d 182, 187 (1974)

48-49 (1974). In view of the pivotal role Congress has given to state anti-discrimination laws in the prosecution of all discrimination claims, the plausible inference is that Congress did not intend to preempt these laws by the NLRA.

Finally, as Judge Lynch pointed out in her well-reasoned dissent, in Brown v. Hotel & Restaurant Employees, International Union Local 54, 468 U.S. 492, 509 (1984), this Court held that a New Jersey law regulating the electoral qualifications for union representatives in the casino industry was not preempted by §7 of the NLRA. The Court found that sections 504 and 603(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 et seq. at §§504 and 523(a)(LMRDA)(1994 Ed.), specifically allowed for state regulation as to these qualifications. The LMRDA's reservation of states' rights in this area evidenced Congress' intent that employees' rights to select representatives of their choice under §7 of the NLRA was not absolute. In light of the Congress' reservation of the states' rights to enforce the anti-discrimination laws in Title VII, a similar analysis is warranted here.

II. Inasmuch As Preemption Here Would Deny Victims Of Discrimination The Ability To Obtain Their Full Rights And Remedies Under Anti-Discrimination Laws, It Is Wholly Inappropriate

The Court should also be aware that, if it denies the petitioner's writ, such a denial will adversely affect discrimination victims. These victims will be prevented from

attaining their full rights presently granted to them under state law. At the same time, those same rights will not be fully protected by the NLRA.

Under Massachusetts law, complainants who prove that their employers discriminated against them on the basis of gender may be awarded both compensatory and punitive damages. Mass. G.L. c. 151B, § 9. See, Fontaine v. Ebtec Corp., 613 N.E.2d 881, 887-890 (1993). These same damage remedies are also available to complainants under Title VII. 42 U.S.C. § 1981a(a)(1994 Ed.).

The above remedies are not available under the NLRA, however. Under § 10(c) of the NLRA, the remedial authority of the Act's enforcement arm, the NLRB, only allows it to "take such affirmative action . . . as will effectuate the policies of this Act." 29 U.S.C. §160(c)(1994 Ed.). This power has been interpreted to limit the Board to issuing remedies which restrain violations of the Act. Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 219-220 (1938).

Though the Board is allowed discretion to make compensatory awards, these are largely limited to awards of backpay, with some exceptions for extraordinary violations. Awards for pain and suffering are beyond the Board's authority. See generally, Douglas S. McDowell, NLRB Remedies For Unfair Labor Practices, Labor Relations and Public Policy Series, Report No. 12 (1974). Likewise, the Board has no authority to award punitive damages. Consolidated Edison, 305 U.S. at 219-220.

The denial of damage remedies to individual discrimination victims is in direct conflict with Massachusetts' judgment that these victims are entitled to more complete compensation than is warranted under the NLRA. More importantly, however, the damage remedies in a discrimination case are central to ensuring the eradication of discrimination in the workplace inasmuch as these remedies deter employers from engaging in discriminatory practices. Albemarle Paper Company v. Moody, 422 U.S. 405 at 418 (1975). Thus, the public at large is hurt if the NLRA is allowed to preempt state anti-discrimination laws.

Similarly, federal labor preemption is unwarranted here because it would severely limit the ability of complainants to obtain attorney's fees. As with damages remedies, both Chapter 151B and Title VII allow victims to collect awards for attorney's fees if they are able to prove discrimination. Mass. G.L. c. 151B, § 9; 42 U.S.C. § 2000e-5(k) (1994 Ed.). Like damage awards, these fee awards contribute in a very meaningful way to achieving the goal of a discrimination-free workplace by ensuring that victims who might not otherwise be able to afford legal counsel will be able to obtain representation. However, in contrast to the Massachusetts discrimination laws, the established practice of the Board under the NLRA is to award attorney's fees only in the case where a employer asserts a patently frivolous defense. Heck's Inc., 215 NLRB 765 (1974). Thus, in order that victims of discrimination continue to have realistic and viable avenues to obtain representation in the prosecution of their cases, NLRA preemption should not be applied to these laws.

III. The Court Of Appeal's Decision Has Erroneously Applied The Law Of Federal Labor Preemption As This Court Has Interpreted It

The final reason for granting the petition is that the Court of Appeals' decision is in conflict with other controlling precedent of this Court. In holding that Ms. Doulamis' gender discrimination claim before the MCAD was preempted by the NLRA, the Court of Appeals relied, not only on San Diego Building Trades v. Garmon, 359 U.S. 236 (1959), but also on Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978). In doing so, the Court clearly misapplied Sears, Roebuck, as well as Garmon.

Inasmuch as sex discrimination, the conduct at issue in this case, is not protected by the NLRA, the Court recognized that it must use the standard established by Sears, Roebuck for conduct which is "arguably prohibited" by the NLRA. Pet. App. 21A-25A. For Garmon preemption to apply under this standard:

> the critical inquiry . . . is not whether the state is enforcing a law specifically relating to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been presented . . . to the Labor Board.

Sears, Roebuck, 436 U.S. at 197 (emphasis added).

After evaluating Doulamis' claim in light of the Sears, Roebuck standard, the Court of Appeals concluded that her claim before the MCAD was "the same in a fundamental respect" with the Union's unfair labor practice charges before the Board. Pet. App. 24A. The Appeals Court based its decision on Doulamis' allegation that she was targeted for harassment for union activities to the exclusion of other male union supporters. Significant to the Court's analysis was the fact that the Board had assumed jurisdiction over the Union's unfair labor practice charges against Chaulk, that Doulamis' claim arose out of the same factual setting as these charges, and that the MCAD would necessarily have to make a determination as to whether Doulamis was engaged in protected union activities in order to resolve her complaint. Pet. App. 21A-25A.

The Court's approach, however, completely misinterpreted Sears, Roebuck. When the conduct at issue is arguably prohibited by the NLRA, the critical factor is whether the controversies are identical, not whether they are related or that they arise out of a common factual setting. Sears, Roebuck, 436 U.S. at 194-97. Thus, whether the Board has or has not assumed jurisdiction over the Union's charges is of no relevance in and of itself. What matters is the specific inquiry the respective agencies would make as they investigate the allegations.

In the Union's case before the Board, the focus of inquiry would be whether Chaulk had threatened Doulamis with dismissal because of her union activities. See, Frick Paper Co. 319 NLRB No.3 (1995). In contrast, the MCAD's

investigation would focus upon whether Doulamis was treated differently from the other men who were engaged in union activities, and, if so, whether this treatment was gender motivated. See, Beal v. Board of Selectmen of Hingham, 646 N.E.2d 131(1995); Rideout v. Crum & Forster Commercial Ins., 633 N.E.2d 376(1994). Indeed, in this respect, Doulamis' MCAD claim is fundamentally no different than if she were alleging that Chaulk had allowed its male employees to eat in the break room, while at the same time prohibiting women from doing so; or that Chaulk allowed the men to violate work rules and yet enforced the same rules against the women.

Moreover, the fact that the Court of Appeals found that there were common facts between the claims before the Board and the MCAD is not determinative. Factual parallelism in and of itself does not militate for preemption in "arguably prohibited" cases. Rather, preemption hinges on whether the legal analysis to be applied to the facts would be the same. See, Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 408-410 (1988); Sears, Roebuck, 436 U.S. at 196-197.

Finally, as the above discussion has made clear, the MCAD would not have to make any determinations as to whether Doulamis was engaging in protected union activities in order to resolve her complaint. All the MCAD would need to determine is whether Doulamis was treated differently from the men because she was a women. Indeed, the MCAD was specific on this point in its order denying Chaulk's motion to dismiss.

Thus, the Court of Appeals's preemption analysis was fundamentally wrong. It more closely resembled the standard established by Sears, Roebuck for conduct "arguably protected" by the NLRA. This standard focuses merely on whether the NLRB has clear jurisdiction over the controversy and whether the state action clearly poses dangers for the integrity of that jurisdiction.

In view of the fundamental differences between the two claims, there is no basis for concluding that MCAD jurisdiction would pose any danger of conflict with the Board's. Accordingly, Garmon preemption is inapplicable. Inasmuch as the Court of Appeals misapplied U.S. Supreme Court precedent, as well as Massachusetts precedent, this Court should grant review.

CONCLUSION

The serious errors in the decision of the Court of Appeals, combined with the conflicts with other decisions and the important public interests affected by the decision, warrant review of that decision by this Court. For the foregoing

reasons, NELA respectfully requests the Court to grant the petitioner's writ of certiorari.

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